THE APPOINTING AND REMOVAL POWER
OF THE
PRESIDENT OF THE UNITED STATES

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THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES

A TREATISE

ON THE SUBJECT OF THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT OF THE UNITED STATES

BY

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FROM THE OFFICE OF
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SENATE RESOLUTION No. 204

[Reported by Mr. SHIPSTEAD]

IN THE SENATE OF THE UNITED STATES,

December 15, 1928.

Resolved, That the manuscript entitled "The Appointing and Removal Power of the President of the United States," by Charles E. Morganston, be printed, as may be directed by the Joint Committee on Printing, as a Senate Document.

Attest:

EDWIN P. THAYER,
Secretary.

PREFACE

In the preparation of this book, its purpose has been to supply a decided want. Heretofore there has never been published a book upon the appointing and removal power of the President of the United States which offered a complete treatise on the subject, and when questions arose appertaining to this power of the Chief Executive of the United States and of our Congress it was necessary to resort to numerous and varied writings, articles, and miscellaneous works in order to ascertain its exercise and scope.

This treatise is designed for those in any way connected with the Federal Government, for those particularly interested in the appointing and removal agencies of the several classes of Federal offices, and for students making a special study of our Constitution and Government and the political sciences.

Article II, section 2, clause 2, of the Constitution, with reference to the appointing authority, provides that—

> he shall nominate and, by and with the advice and consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law; but Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or in the heads of departments.

The power of presidential appointment of officers is here specifically granted, subject, nevertheless, to the restriction of the Senate. The removal power being incidental to the power of appointment, the question arises whether upon any removals by the President they must

be made in accordance with this section and subject to the restriction of the Senate, or are constitutionally made independent of this section.

Section 1 of this article also provides that "the Executive power shall be vested in a President of the United States of America," and section 3 provides that "he shall take Care that the Laws be faithfully executed." Do these sections in any way affect the appointment and removal power of the President, or are we to disregard them and literally construe section 2, clause 2? Does the Constitution, in addition to the express grant of appointment, confer a similar grant of removal on the President, or is the removal authority in him an implied one? These questions have been debated many times in our Congress, from the adoption of our Constitution to the present day, and likewise have been the subject of controversy before our courts on many occasions.

In answering these questions and in the preparation of this work, it has been necessary to examine the debates during the Constitutional Convention and subsequent debates in Congress, and to make an exhaustive research of hundreds of other works and articles in any way alluding to or commenting upon this power. The appointing office since the Civil War is likewise shown herein in order that its importance during the period of reconstruction and to the present day might be appreciated, together with many court decisions touching this power.

In offering this book, the task of burdensome and tiresome research heretofore necessary has been to an appreciable degree alleviated, and it is hoped that it will serve as an authoritative reference and guide to those especially concerned in this power.

CHARLES E. MORGANSTON.

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THE APPOINTING AND REMOVAL POWER OF THE PRESIDENT

CHAPTER I

THE ESTABLISHMENT OF THE APPOINTING POWER

SECTION 1. BRITISH SYSTEM, AND COLONIAL SYSTEM UNDER THE ARTICLES OF CONFEDERATION, 1781–1788.

The Government of the United States under the Articles of Confederation possessed no executive department. The President of Congress was merely the presiding officer of that body, and all executive business was carried on through committees appointed by and under the control of Congress. Under this form of government there was no division of powers among distinct departments and whatever powers the National Government had were centered in the Congress.[1]

The governments of the States, unlike that of the Federal sovereignty, possessed the threefold division of powers; the Legislative, Executive and Judicial.[2] This system of distribution of power was specifically provided

[1] Articles of Confederation, Article IX, section 5:

"The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States,' and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of President more than one year in any term of three years, . . ."

[2] Constitutions of the States. Poore, B. J. "Charters and Constitutions." (Washington. Government Printing Office, 1877.)

for in the constitutions of all 13 States. In 11 of the States the executive power was vested in a single officer, a governor, while in two, this power was entrusted to an executive council.[3]

In Great Britain a change in executive authority had already evolved whereby this authority had passed from the King to a ministry responsible no longer to the King but to Parliament, and primarily to the House of Commons, which was brought about through revolt from absolutism.[4] This important innovation was the development of the English ministry system.[5]

The union of all the different political and religious factors of the English people, which had called William and Mary to the throne of England,[6] was the mere laying aside, instead of the burying, of differences, and these differences broke out again as soon as the common danger had been removed. William of Orange was rather concerned with the larger politics of Europe than the insular politics of England. He desired to consider all the previous difficulties as settled and determined by the Bill of Rights and to unite England in the support of those great objects which he considered necessary for the preservation of the liberties of all Europe, and for this reason he chose his ministers at the start from the leaders of all political shades. The condition of English politics was such, however, as to render the permanency of such an arrangement impossible. Although the King, after the passage of the Bill of Rights, still retained for a time some actual share in the government of England, still the change was rapidly developing by which the power of the executive department passed from the King to the Ministry, consisting of the highest offices of the various administrative

[3] Pennsylvania and Delaware.

[4] After the passage of the Bill of Rights in 1688.

[5] During the period from the adoption of the Bill of Rights in 1688 to the accession of George III in 1760.

[6] In 1688.

departments. One effect of the introduction of the ministry system was to aid in that course of events which was transferring the ruling power from the King to the House of Commons, to whom the ministry were responsible; it tended to destroy the balance of power between the executive and legislative departments and to make the latter entirely dependent upon the former.[7] Under this system the Prime Minister was to control the appointment to every office of profit under the Crown.

The Bill of Rights was the last event in English history which was to have a direct influence upon the form of government to be adopted in the United States. The important later changes in the workings of the English Government—the result of which was to do away with the division of power among the separate departments and to make the House of Commons practically supreme—did not extend to the government of the American Colonies and were imperfectly understood by the Americans of the time of the Declaration of Independence or of the adoption of the Constitution.

While the ministry system was not considered during the sessions of the Federal Constitutional Convention, yet it was apparent that some of the delegates were acquainted with the appointment power of the Prime Minister. Such delegated authority, they thought, to one individual was fraught with dangers, for if a republican form of government was to be guaranteed to the several States and the people, the investment of this power in a single individual would only be paving the way to a hereditary monarchy.

The experience and training of those statesmen who were to frame a constitution for the American people was such as to lead them toward a government with sharply defined legislative, executive, and judicial departments. This was the government of their States and

[7] Putney, Albert H. Constitutional Law, pp. 71–72. (Chicago, 1908.)

they were of the firm conviction that the National Government should be founded upon the same basis. The Federal Government under the Articles of Confederation proved unsatisfactory and was an utter failure, as it possessed no division of departmental powers. This system, therefore, was not to be followed in modeling the new structure of Federal Government, which was to be the American Constitution, as some of the most influential members of the convention were convinced that experience had shown the "impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment were the necessary consequences" [8] so far as appointments to public office were concerned.

SECTION 2. CONSTITUTIONAL CONVENTION OF 1787.

So it happened that a Federal Convention met at Annapolis on the 11th day of September, 1786, and rendered a report as to the proposed revision of the Federal governmental system, and later, May 14, 1787, a second convention was assembled in Philadelphia for the purpose of considering the report previously submitted and to frame a permanent system of government, a constitution.[9]

If a division of departments was to be had were they to include an executive department and, if so, was it to have a single head or was it to consist of a plurality of officers, and on the establishment of such a department what appointing power was its head to enjoy, if

[8] Farrand, Max. Records of the Federal Convention, New Haven, 1910, vol. 1, p. 119.

[9] In February, 1787, a resolution was adopted by the Congress recommending a convention in Philadelphia in the May following of delegates from the various States "for the purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, under the Federal Constitution be adequate to the exigencies of government and the preservation of the Union." Cooley, Thomas M. Constitutional Law (3d ed.), p. 15.

any? Many discretionary prerogatives, it was foreseen, were to come directly under the Executive should such power be entrusted to him exclusively, the exercise of which might prove dangerous to the Union, and most assuredly disastrous from a political standpoint, as culminating from this exclusive power was to come either the upbuilding of a great nation or the further separation of divided colonies. To give this power indiscriminately to a chief executive might also mean the condemnation of those entrusted with the framing of the Constitution should it not withstand the rigid tests and ordeals to which it was later to be subjected, as the delegates were selected for their supreme wisdom in giving to the people of the States the best form of government—a republican government.

These were serious and delicate questions the delegates were obliged to consider, for in granting such exclusive power to the head of the executive department, it was contended, no check of any kind was offered as to its exercise.

However, most of the delegates to the task were well prepared to meet the situation, as they already had some knowledge of the British system and had likewise tested, through experience, many surprises and disappointments by the exercise of this power on the part of the chief executives of certain of the Colonies. Many of the States had already experimented with this phase of the question, but in no one was the system deemed successful.

Benjamin Franklin was bitterly opposed to any such executive prerogative, as he had experienced no little abuse of the power and the evils and dangers resulting from its indiscriminate use by the chief executive of his own State. He contended that if the executive head was to have such authority he could override the will of the whole people and could refuse to assent to important and necessary measures till new appointments were referred

to him; and, having by degrees engrossed all these into his own hands, the American Executive, like the British, would, by bribery and influence, save himself the trouble and odium of exerting his negative afterwards.

Col. George Mason inveighed against the "shameful partiality of the Legislature of Virginia to its own members," [10] and was no less a supporter in denying this power to one person than was Benjamin Franklin, and he maintained that by vesting the appointment power in a single executive we were constituting a British government but a more dangerous monarchy, an elective one. He further contended that a new principle was being introduced into our system of government, and one not necessary, as in the British Government, where the executive had greater rights to defend.[11]

Alexander Hamilton likewise advocated opposition to the system and in discussing its weakness in his own State—where the appointing power was vested in a governor and council of appointment—declared that "scandalous appointments to important offices have been made." Some cases, indeed, have been so flagrant that *all parties* have agreed to the impropriety of the thing.[12]

As to the appointment of judges by the Executive, disapprovals were likewise evidenced in granting any such power to a single person. Should such power be granted it was contended that the Executive would be immune from impeachment, as the very judges he appointed would hear the proceedings and, of course, decide in his favor. Favoritism for political considerations seemed to be the verdict forecast by the opposition, and this should not be, as under a republican form of

[10] Elliot, Jonathan. Debates on the Adoption of the Federal Constitution, Washington, 1845, vol. 5, pp. 230–232.

[11] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, p. 105.

[12] Federalist (Universal Classics Library edition), vol. 2, p. 55.

government no man was to be so high above the law that he could not be reached by judicial process. If this was not true to all alike, the Executive would then be at liberty to exercise his duties in any manner he might see fit, possibly, and more likely, to his own selfish gain and he would not be held accountable, as the Constitution would afford him this protection.

Mr. Nathaniel Gorham, of Massachusetts, in order to safeguard against partiality and favoritism, offered a motion "that the judges be nominated and appointed by the Executive, by and with the advice and consent of the second branch" (the Senate), which met with favor as well as opposition as evidenced by the equal division of votes.[13] However, his motion was later agreed to nem. con.[14] This offered a check on the President as to the appointment outright of official aspirants and likewise divided the responsibility. It was the belief of many of the delegates that this check and method of appointment practically shifted the responsibility from the Executive to the Senate as with the second branch was the appointment to be confirmed or rejected and for any subsequent objections to any appointee the Senate was to share in the responsibility.

As to vacancies arising during the adjournment of Congress, Mr. Spaight, of North Carolina, introduced as his idea the motion "that the President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session of the Senate," and which was agreed to nem. con.[15]

With the many views expressed by the delegates, the convention faced a perplexed situation. As to how they

[13] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, pp. 374, 377.

[14] Ibid., p. 681. (Sept. 7, 1787.)

[15] Ibid., pp. 681–682.

could incorporate into the Constitution all the excellencies of the State constitutions and yet avoid the many weaknesses that had become manifest during their operation was the problem to be considered, and with this purpose in mind, three different plans were submitted as an aid in solving the confusion.[16]

The Virginia plan, presented by Edmund Randolph, contained no special provision dealing with the appointment of officers, but the President was empowered to "enjoy the executive rights vested in Congress by the Confederation." [17] This general authorization was probably designed to include the appointing power, but inasmuch as the Executive was to be elected by both Houses of Congress, the control over appointments would, in a large measure, rest ultimately with Congress.[18]

The New Jersey plan, offered by Mr. William Patterson, provided for a plural executive [19] with the power of appointment to all Federal offices.[20] But in this plan also the Executive was to be elected by Congress, therefore the

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[16] Note the tenor of Mr. Madison's letter of Apr. 16, 1787, in his Works, vol. 1, pp. 287–292.

[17] Virginia plan, section 7. Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, pp. 61–62. (See Appendix B, supra.) Elliot, Jonathan. Debates on the Adoption of the Federal Constitution, Washington, 1845, vol. 5, pp. 127–128.

[18] Articles of Confederation, Art. IX, sec. 5. (See p. 1, supra.)

[19] New Jersey plan, section 4, "Resolved, that the United States in Congress be authorized to elect a Federal Executive, to consist of — persons . . ." Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, pp. 164–167.

[20] New Jersey plan, section 4, "Resolved, that the Executive, besides their general authority to execute the Federal Acts, ought to appoint all Federal Officers not otherwise provided for. . . ." Section 5, "Resolved, that a Federal Judiciary be established, to consist of a supreme tribunal, the Judges of which to be appointed by the Executive. . . ." Ibid. p. 165. (See Appendix C, supra.)

appointing power would in reality be shared with Congress, which would exercise a very considerable amount of control.[21]

The plan presented by Mr. Alexander Hamilton, of New York, differed greatly from the Virginia and New Jersey plans in that it made provision for a President, with a life tenure, to be chosen by presidential electors. The Executive was to have the sole appointment of the heads or chief officers of the Departments of Finance, War, and Foreign Affairs and the nomination of all other officers (ambassadors to foreign nations included), subject to the approbation or rejection of the Senate.[22]

From these several plans the idea of the appointing power on the part of their authors is well defined, and the essential differences of these projects, as they were considered by the convention, were:

1. Shall the appointing power be given exclusively to one or both Houses of Congress; or

2. Shall it be given to the Executive, subject to legislative control; or

3. Shall the appointing power be limited in its choice to those who are not Members of Congress?

While these questions constituted the pronounced conclusions of the Delegates, yet there was diversity of opinion among some of them, as "the timid ones, who were still haunted by the fear of monarchy, favored placing the chief power in Congress, but making its Members ineligible to office, thus avoiding, as they thought, too great a power in the hands of one man, and removing any means of temptation from a numerous

[21] Elliot, Jonathan. Debates on the Adoption of the Federal Constitution, Washington, 1845, vol. 5, pp. 191–192.

[22] Mr. Hamilton's plan, Article IV. Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, pp. 185–186. Elliot, Jonathan. Debates on the Adoption of the Federal Constitution, Washington, 1845, vol. 5, pp. 191–192. (See Appendix D, supra.)

body. But the more resolute, farsighted Members knew that if the Executive was to be an executive in more than name he must be given adequate powers, unhampered by needless restrictions; that if he was to carry out the will of the people and be responsible to them, he must be given the choice of his servants; that corruption among many was more to be feared than abuse of power on the part of one; but that as it is sometimes necessary 'to supply the want of wisdom or virtue in one department by the wisdom or virtue of another,' he should be provided with a definite, constitutional means of seeking advice." [23]

NOTE.—Charles Pinckney, of South Carolina, also submitted a plan [24] whereby "the executive power was to be vested in a single person (a President)," who was to "commission all officers of the United States and, except Ambassadors, other Ministers, and Judges of the Supreme Court," to "nominate, and, with the consent of the Senate, appoint all officers of the United States." The Senate was to have exclusive power to appoint those officers of whom exception was made, but its members were to be ineligible to office during their term of service and for one year afterwards. Members of the Lower House were also not to receive office while sitting in Congress. See Appendix E, supra, for Mr. Pinckney's complete plan. It will be observed from a comparison of this plan with the Constitution of the United States that it resembles the Constitution more than any other plan submitted. The author of this work seriously doubts that Mr. Pinckney's plan, as recorded in the journal of the Constitutional Convention, is the original plan Mr. Pinckney had in mind or drafted. Mr. Pinckney undoubtedly incorporated in his original plan the ideas of the other members of the convention as the proceedings of the convention were being approved by that body from time to time, and that when the convention finished its labors Mr. Pinckney had an almost complete report of the proceedings, which he termed as his plan.

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[23] Salmon, Lucy M. The Appointing Power of the President. Papers of the American Historical Association, New York, 1886, v. 1, No. 5, pp. 11–12.

[24] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, pp. 64–72, 449.

On July 26, 1787, some two months after the convention had assembled at Philadelphia, a series of 23 resolutions was referred to the Committee of Detail with instructions to report a Constitution based upon them.[25] These resolutions were evidently a paraphrase of the Virginia plan, as in substance they pointed to similar ends. The twelfth resolution specifically provided "that a National Executive be instituted, to consist of a single person; to be chosen by the National Legislature," and to have power "to appoint all officers in cases not otherwise provided for."[26] The Executive, under the Thirteenth resolution, was given the "right to negative any legislative act, which shall not be afterwards passed, unless by two-thirds of each branch of the National Legislature."[27] By these resolutions, therefore, the President was vested with certain appointing powers, and to those that remained with the National Legislature he was given the "right to negative." By the exercise of this negative privilege, he could at least hold up any appointment on the part of Congress he desired until such time as the National Legislature, by a "two-thirds vote," confirmed their previous action, or nominated another. Resolution 14 provided "that a National Judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the National Legislature,"[28] and Resolution 15 provided for the appointment of inferior tribunals, which likewise vested in the National Legislature.[29]

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[25] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott), Chicago, 1898, pp. 444–449. Elliot, Jonathan. Debates on the Adoption of the Federal Constitution, Washington, 1845, v. 5, p. 376.

[26] Ibid., p. 447. Ibid., p. 376.

[27] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott), Chicago, 1898, p. 447.

[28] Ibid., p. 447.

[29] Ibid., p. 448.

Undoubtedly, the judges to be appointed to the inferior courts were to be appointed by the body creating such courts, but no specific mention of this is made. The Chief Executive, under these resolutions, could voice his disapproval of any judicial appointment made by the Senate, and which would act as a stay to the filling of such vacancy or office. If, on the other hand, the Senate appointed another for the office instead of passing upon the appointee of the first instance, after the disapproval of the President, the Chief Executive, through the exercise of indirect influence, might induce the nomination of one acceptable to him. By such procedure, in time of great stress and the immediate necessity in having the particular office filled, no doubt the Senate would listen and yield to the appeal of the President in his choice for the vacancy, and in this manner gain the power denied him.

The Committee of Detail, August 6, 1787, rendered its report, which in most particulars incorporated the recommendations contained in the 23 resolutions, the only important change being the inclusion of a clause giving the Senate the additional power of appointing ambassadors.[30] This draft, however, was not acceptable to the convention, so on August 31 of the same year such parts of the Constitution as have been postponed and such parts of reports as have not been acted upon were referred to the Committee of Eleven.[31]

On September 4, 1787, the Committee of Eleven reported an entirely new draft and one fundamentally

[30] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, pp. 449–462.

[31] Ibid., p. 648. The committee comprised a member from each State: Gilman, of New Hampshire; King, of Massachusetts; Sherman, of Connecticut; Brearly, of New Jersey; Gouverneur Morris, of Pennsylvania; Dickinson, of Delaware; Carroll, of Maryland; Madison, of Virginia; Williamson, of North Carolina; Butler, of South Carolina; Baldwin, of Georgia.

different from the draft of August 6. By article 4 of this draft it was provided that the President should be chosen by an electoral college for a term of four years,[32] and that "by and with the advice and consent of the Senate, shall have power to make treaties; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint Ambassadors, and other Public Ministers, Judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise herein provided for."[33]

Thus, instead of dividing the power of appointment between the Executive and the Senate, as had been provided for in the draft reported by the Committee of Detail and the numerous resolutions up to this time introduced at the convention, it was now proposed to have the appointing power united in the Executive with the power of negativing these presidential nominations being vested in the Senate. The expressed idea heretofore was to vest Congress with the appointing power, with a negative in the President. Under the system embodied in the present draft, the Executive alone assumes the responsibility in making his selections and nominating them for senatorial approval. This draft, as reported, was substantially adopted by the convention,[34] and in the finished draft of the Constitution the section dealing with the appointing power is nearly identical with the recommendations contained in the draft of the Committee of Eleven, as will be noted from Article II of the Constitution:

Section 2, clause 2: ". . . and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments

[32] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, p. 654.

[33] Ibid., art. 7, pp. 655–656.

[34] September 17, 1787.

are not herein otherwise provided for: but the Congress may by Law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Section 2, clause 3: "The President shall have Power to fill up all vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

Section 3: ". . . and shall Commission all Officers of the United States."

Chapter II

THE INTERPRETATION OF CONGRESS IN 1789

The Constitution having already been adopted, its functions were now to be observed.

When the first Congress under the Constitution assembled in the spring of 1789, it was not long before it was discovered that many of the clauses in the Constitution were open to diverse interpretation and objection. The framers of this document, however of the belief that all matters pertaining to our National Government were forever settled, soon saw their masterpiece attacked by the statesmen of the day representing both Houses of Congress. The numerous interpretations placed upon the construction of its phraseology and the intention of its authors offered considerable debate. Especially was this true as regards the appointing power.

On May 19, 1789, the question of the proper interpretation of the appointing clause arose when Mr. Madison moved the establishment of the executive Departments of Foreign Affairs, of the Treasury, and of War.[1] The debates following the motion offered for discussion many propositions, the most of importance being:

1. Does the appointing power include the removing power?

2. Does the removing power belong to the President or to the Senate?

3. If the power of removal belongs to the President, can Congress provide for a specific tenure to be attached to any particular office?

After the debate upon Mr. Madison's motion, the Committee of the Whole instructed him to introduce a reso-

[1] Annals of Congress (1st Cong., 1st sess., vol. 1, pp. 369–372).

lution calling for the establishment of a Department of Foreign Affairs. According to this resolution the Secretary (who was to be the head of this department) was to be an officer "appointed by the President by and with the advice and consent of the Senate," and "to be removable by the President." The removal phrase led to a renewal of the debate upon the correct interpretation of the clause in the Constitution dealing with the appointing power.

Mr. Smith, of South Carolina, objected to the last part of Mr. Madison's motion "because it declared the President alone to have power of removal." His objection was prompted by his conviction in that "he had doubts whether the officer could be removed by the President. He apprehended he could only be removed by an impeachment before the Senate, and that being once in office he must remain there until convicted upon impeachment." [2]

The arguments advanced by Mr. Smith touching this question were not without support, as many of the members feared an increase in executive power, and who also believed that in the question before the House there was no constitutional warrant for it. According to Mr. Bland, the power given by the Constitution to the Senate, respecting the appointment to office, would be rendered nugatory if the President had the power of removal. He thought it consistent with the nature of things that the power which appointed should remove.[3]

Mr. Jackson agreed with Mr. Bland in that "the body who appointed ought to have the power of removal," and he was seconded by Mr. White, who conceived that "in all cases the party who appointed ought to judge of the removal, except in those cases which by the Constitution are excepted." Also, notwithstanding the fact that it might be expedient to vest in the President the entire power to remove officers, yet he believed that the Senate

[2] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 372).
[3] Ibid., p. 374.

would be loath to part with a power which they might think the Constitution vested in them.[4]

Mr. Gerry, after reciting the clause in the Constitution dealing with the appointing power, challenged the supporters of presidential removal to produce any constitutional sanction for their stand. "I am for supporting the President to the utmost of my power," he declared, "but I can not think we ought to give authority to remove from office in cases where the Constitution has placed it in other hands." [5]

The arguments in favor of presidential removal received their most cogent expression in the remarks of Mr. Madison, and in this connection it is interesting to observe that the strongest note sounded by him in his plea for presidential removal was that of "expediency." He begged his colleagues to consider the inconveniences of "keeping the Senate constantly in order to give their assent to the removal of an officer; they might see there would be constant probability of the Senate being called upon to exercise this power, consequently, they could not be a moment absent." [6]

The question before the Committee of the Whole was now taken and carried by a considerable majority in favor of declaring the power of removal to be in the President.[7]

On May 22 the House appointed a Committee of Eleven [8] to prepare a bill in accordance with the resolution passed on May 19, and on June 16 the bill prepared in response to these instructions came up before the Committee of the Whole for consideration. A spirited debate again ensued, lasting four entire days. Upon this

[4] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 376).

[5] Ibid., pp. 380–381.

[6] Ibid., p. 376.

[7] Ibid., p. 384.

[8] Three of the eleven members had been delegates to the Philadelphia Convention.

occasion the opponents of presidential removal had the supporters of that theory at a decided advantage by quoting from an authoritative contemporary exposition of the Constitution, which clearly indicated that in April, 1788, the most ardent proponents of the Constitution believed in the right of the Senate to share in the removal power.

It is of interest to note that immediately after the Constitutional Convention had ceased its labors in September, 1787, there began to appear in the newspapers of New York a series of letters over the non de plume of Publius in defense of the finished draft of the Constitution. These papers, now known as the "Federalist" papers, came from the pens of John Jay, Alexander Hamilton, and James Madison. From the very moment of their first appearance to the present day they have been regarded as of high authority in the interpretation of the Constitution, and as they continued to be published throughout the autumn of 1787 and the spring of 1788, the supporters of the new system, many of whom had been members of the Constitutional Convention, constantly referred to these "Federalist" papers as the clearest exposition of the Constitution, which was then before the people for acceptance.

There was no question that the authors of these papers were thoroughly conversant with their task, so on April 4, 1788, when Mr. Hamilton explained at length the extent of the appointing power under the Constitution, there was no objection raised against his exposition. According to him, the removal power under the Constitution was to be shared between the President and the Senate, and no removal from office could be made without the approval of the Senate. The first paragraph of his exposition is as follows:

> It has been mentioned that, as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The

consent of that body will be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the offices of the Government as might be expected if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change of a person more agreeable to him by the apprehension that a discountenance by the Senate might frustrate the attempt and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be disposed to prize a provision which connects the official existence of public men with the approbation or disapprobation of that body, which, from the greater permanency of its own compositions, will in all probability be less subject to inconstancy than any other member of the Government.[9]

On June 16, 1789, when this question of the removal power under the Constitution again came before the House of Representatives in the shape of a bill for the establishment of a Department of Foreign Affairs, Mr. Smith, of South Carolina, immediately referred to this passage just quoted from the Federalist papers to show that the fathers of the Constitution considered that the Senate had an equal share with the President in the power of removal from office.[10]

Mr. Madison, who rose to answer Mr. Smith, avoided all mention of the interpretation of the removal power given in No. 77 of the Federalist papers, and confined himself to a line of general argument against giving the Senate any control over what he termed "strictly executive functions." As on a former occasion, he stressed his already familiar argument of the "expediency" of presidential removal.

Mr. Madison's statements were challenged by Mr. White, who observed that under the Constitution the doctrine of the separation of powers had not been strictly adhered to. In the realm of political science it might be considered that the powers of appointment and

[9] Federalist, No. 77 (Lodge ed.), pp. 476–477.

[10] Annals of Congress (1st Cong., 1st sess., vol. 1, pp. 456–457).

removal were purely executive functions, but in the Constitution the executive and legislative functions were often blended, and no matter how pernicious such a system might be regarded in theory, the fact remained that the Constitution had expressly provided for such a condition of interdependence. The question of expediency he dismissed in the following words:

> If we were framing a Constitution, these arguments would have their proper weight, and I might approve such an arrangement. But at present I do not consider we are at liberty to deliberate on that subject. The Constitution is already formed, and we can go no further in distributing the powers than the Constitution warrants.[11]

During this discussion of the President's prerogative and power of removal, more or less fear was expressed that such a constitutional rule of construction as was involved in the passage of the bill would necessarily expose the country to tyranny through abuse of exercising this power of removal by the Chief Executive, and underlying such fears was the fundamental misconception that the President's attitude in his exercise of power is one of opposition to the people, while the Congress is their only defender in the Government. This fear, however, was timely dispelled by Mr. Madison in his discussion on the question.[12]

The requirement of the second section of Article II that the Senate should advise and consent to presidential appointments was to be strictly construed, and the construction of section 2 was either an enumeration and emphasis of specific functions of the Executive, not all inclusive, or were limitations upon the general grant of the executive power, and as such, being limitations, should not be enlarged beyond the words used.[13]

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[11] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 468).
[12] Ibid., p. 461.
[13] Ibid., pp. 462, 463, 464.

Mr. Boudinot, of New Jersey, in vesting this power in the President and denying it to the Senate, said:

> The supreme executive officer against his assistant; and the Senate are to sit as judges to determine whether sufficient cause of removal exists. Does not this set the Senate over the head of the President? But suppose they shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence, reversing the privilege given him by the Constitution to prevent his having officers imposed upon him who do not meet his approbation?[14]

Mr. Madison and his supporters dwelt at great length that Article II gave the President the sole power of removal, and that it should be so construed, as without such construction it would be impossible to place responsibility on him for his conduct as head of the executive branch, as the third section of the article expressly declared the President's duty and responsibility to "take care that the laws be faithfully executed," and that if he was to be responsible to the people in seeing that the laws were faithfully carried out, he should not be hampered or embarrassed by the intervention of any other department in encroaching upon the President's office and duties by any limitation,[15] and in stressing this construction upon his colleagues, Mr. Madison said:

> Vest this power in the Senate jointly with the President and you abolish at once that great principle of unity and responsibility in the executive department which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.[16]

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[14] Annals of Congress (1st Cong., 1st sess., vol. 1, pp. 468–469).

[15] Ibid., pp. 496–497.

[16] Ibid., p. 499.

Other arguments advanced in the First Congress against an implication of the removal power being in the President alone from its necessity in the proper administration of the executive power was that all embarrassment in this respect could be avoided by the President's power of suspension of officers, disloyal or incompetent, until the Senate could act.

Mr. Benson had all along contended this power directly in the President, and he was a leader of the proponents of this interpretation of Article II. On June 17 his position is clearly and firmly indicated when he said:

> Gentlemen ask, Will not the power of suspending an officer be sufficient to prevent malconduct? Here is some inconsistency in their arguments. They declare that Congress have no right to construe the Constitution in favor of the President, with respect to removal; yet they propose to give a construction in favor of the power of suspension being exercised by him. Surely, gentlemen do not pretend that the President has the power of suspension granted expressly by the Constitution; if they do, they have been more successful in their researches into that instrument than I have been. If they are willing to allow a power of suspending, it must be because they construe some part of the Constitution in favor of such a grant. But admitting it proper to grant this power, what then? When an officer is suspended, does the place become vacant? May the President proceed to fill it up? Or must the public business be likewise suspended? When we say an officer is suspended, it implies that the place is not vacant; but the parties may be heard and, after the officer is freed from the objections that have been taken to his conduct, he may proceed to execute the duties attached to him. What would be the consequence of this? If the Senate, upon its meeting, were to acquit the officer, and replace him in his station, the President would then have a man forced on him whom he considered as unfaithful; and could not, consistent with his duty and a proper regard to the general welfare, go so far as to intrust him with full communications relative to the business of his department. Without a confidence in the executive department, its operations would be subject to perpetual discord, and the administration of the Government become impracticable.[17]

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[17]Annals of Congress (1st Cong., 1st sess., vol. 1, p. 507).

Mr. Vining, who was one of Mr. Madison's strongest supporters in declaring that this power belonged to the President, said:

> The Department of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them; but take away his controlling power, and upon what principle do you require his responsibility? The gentlemen say the President may suspend. They were asked if the Constitution gave him this power any more than the other? Do they contend the one to be a more inherent power than the other? If they do not, why shall it be objected to us that we are making a legislative construction of the Constitution, when they are contending for the same thing?[18]

In his final appeal Mr. Sedgwick, of Massachusetts, placed before the body several interrogatories, which he thought would assist the doubtful members in placing a similar interpretation on Article II as he and a number of his fellow members did, as follows:

> Notwithstanding the length of the debate and the fatigue gentlemen have undergone, I still flatter myself that the importance of the subject will entitle me to a further indulgence. . . . Shall a man under these circumstances be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President? If he is, where is the responsibility? Are you to look for him in the President, who has no control over the officer, no power to remove him if he acts unfeelingly or unfaithfully? Without you make him responsible, you weaken and destroy the strength and beauty of your system.[19]

In defense of this contention, Mr. Baldwin, of Georgia, said:

> I am well authorized to say that the mingling of the powers of the President and Senate was strongly opposed in the convention which had the honor to submit to the consideration of the United States and the different States the present system for the government of the Union. Some gentlemen opposed it to the last, and finally it was the principal ground on which they refused to give it their signature and assent. One gentleman called it a monstrous and unnatural connection

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[18] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 512).

[19] Ibid., pp. 520, 522, 523.

and did not hesitate to affirm it would bring on convulsions in the Government. This objection was not confined to the walls of the convention; it has been subject of newspaper declamation, and perhaps justly so. Ought we not, therefore, be careful not to extend this unchaste connection any further? [20]

Perhaps no Member of the House was more sincere in his arguments than Mr. Madison, and in his endeavor to convince the doubtful Members as to the soundness of the principle that the three departments should be independent, one from the other, and in the hope of having those hesitant finally share his beliefs, he was on the floor at every opportunity, and in the discussion as to the respective powers of the Executive and the Senate, he remarked:

Perhaps there was no argument urged with more success or more plausibly grounded against the Constitution under which we are now deliberating than that founded on the mingling of the executive and legislative branches of the Government in one body. It has been objected that the Senate have too much of the executive power, by having control over the President in the appointment to office. Now, shall we extend this connection between the legislative and executive departments which will strengthen the objection and diminish the responsibility we have in the head of the Executive? [21]

During this great debate it was pointed out that the power of removal, though equally essential to the executive power, is different in its nature from that of appointment.[22]

On June 22, in the renewal of the discussion, Mr. Benson moved to amend the bill, by altering the second clause, so as to imply the power of removal to be in the President alone. The clause enacted that there should be a chief clerk, to be appointed by the Secretary of Foreign Affairs, and employed as he thought proper, and who, in case of vacancy, should have the charge and custody of all records, books, and papers appertaining

[20] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 557).
[21] Ibid., p. 380.
[22] Ibid., p. 497.

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to the department. The amendment proposed that the chief clerk, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy," should, during such vacancy, have the charge and custody of all records, books, and papers appertaining to the department.[23]

Mr. Benson stated that his objection to the clause "to be removable by the President" arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution,[24] and declared that if he succeeded in this amendment, he would move to strike out the words in the first clause "to be removable by the President," which appeared somewhat like a grant. Now, the mode he took would evade that point and establish a legislative construction of the Constitution. He also hoped his amendment would succeed in reconciling both sides of the House to the decision and quieting the minds of gentlemen.[25]

Mr. Madison admitted the objection made by Mr. Benson to the words in the bill, and said:

> They certainly may be construed to imply a legislative grant of the power. He wished everything like ambiguity expunged and the sense of the House explicitly declared, and therefore seconded the motion. Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President; and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power were intended only to throw light upon what was meant by the compilers of the Constitution. Now, as the words proposed by the gentleman from New York expressed to his mind the meaning of the Constitution, he should be in favor of them, and would agree to strike out those agreed to in the committee.[26]

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[23] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 578).
[24] Ibid., 579.
[25] Ibid., p. 578.
[26] Ibid. pp. 578, 579.

Mr. Benson's first amendment to alter the second clause by the insertion of the words in quotation made that clause to read as follows:

> That there shall be in the State Department an inferior officer to be appointed by the said principal officer, and to be employed therein as he shall deem proper, to be called the chief clerk in the Department of Foreign Affairs, "and who, whenever the principal officer shall be removed from office by the President of the United States," or in any other case of vacancy, shall, during such vacancy, have charge and custody of all records, books, and papers appertaining to said department.

This amendment was approved by a vote of 30 to 18.[27]

Just before the anticipated motion of Mr. Benson, Mr. Madison recalled to the Members what had heretofore been said regarding the power of removal and indicated the manner of his vote on the motion by emphasizing the necessity in construing and declaring the independence of the three departments of government, saying:

> It is needless to assign my reasons why I think the legislature not in possession of this power; they were fully explained before. I therefore shall only say, if there is a principle in our Constitution, indeed, in any free constitution, more sacred than another, it is that which separates the legislative, executive, and judicial powers. If there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices.[28]

Mr. Benson then moved to strike out in the first clause the words "to be removable by the President," in pursuance of the purpose he had already declared, and this second motion of his was carried by a vote of 31 to 19.[29]

It is unquestionably clear that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs

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[27] Annals of Congress (1st Cong., 1st sess., vol. 1, p. 580).

[28] Ibid., p. 581.

[29] Ibid., p. 585.

without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slighest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson impeachment trial of 1868 its meaning was not doubted even by those who questioned its soundness.

Mr. Madison, as it will be noted, proved to have control in the House of Representatives, and on June 24 the engrossed bill in favor of presidential removal passed by a vote of 29 to 22.[30]

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[30] Of the 29 in favor, 5 had been members of the Philadelphia Convention, and a sixth, whose name does not appear on account of absence, was also in favor. The name of only one person appears on the negative who was in the convention. Roger Sherman and Elbridge Gerry (who were also members of the convention) voted in the minority. Gerry refused to sign the Constitution.

Those voting in favor were Ames, Benson, Boudinot, Brown, Burke, Cadwallader, Carroll, Clymer, Contee, Fitzsimmons, Gilman, Goodhue, Griffin, Hartley, Heister, Huger, Laurence, Lee, Madison, Moore, Muhlenburg, Schureman, Scott, Sedgewick, Seney, Sinnickson, Sylvester, Trumbull, and Vining. Fourteen of these gentlemen took part in the discussion.

Those voting against were Coles, Gerry, Grout, Hathorne, Huntington, Jackson, Leonard, Livermore, Matthews, Page, Parker, Partridge, Van Rensselaer, Sherman, Smith of South Carolina, Smith of Maryland, Stone, Sturges, Sumpter, Thatcher, Tucker, and White. Eleven of these gentlemen took part in the discussion.

As to both the appointing and removal power, it is of interest to observe the contentions of some of the Members who made strong appeals during the debate that this power belonged to the President:

Fisher Ames, of Massachusetts: "It is admitted that the Senate may check and regulate the appointment by the President, but they can do nothing more; they are merely an advisory body. . . . The President, I contend, has expressly the power of nominating and appointing, though he must obtain consent of the Senate. . . . with the sole power of removal in the President, the check of the Senate

The proponents of the separate departments of Government knew that their Union under the Confederation had not worked well and they were determined to displace and avoid the resulting evils under the former system of government by creating three separate and distinct departments of the Government in their new plan of constitution.

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in appointments may have a salutary tendency . . ." (Adams, Charles Francis. Appeal to the Whigs. Boston, 1835, p. 35.)

Benjamin Goodhue, of Massachusetts: "He wished to make the President as responsible as possible for the conduct of the officers who were to execute the duties of his own branch of the Government. If the removal and appointment were placed in the hands of a numerous body, the responsibility would be lessened." (Ibid., p. 36.)

John Laurence, of New York: "The Constitution gives an advisory power to the Senate, but it is considered that the President makes the appointment. The appointment and responsibility are actually his. . . . If from the nature of the appointment we are to collect the authority of removal, then I say the latter power is lodged in the President." (Ibid., p. 37.)

Elias Boudinot, of New Jersey: "The President nominates and appoints; he is further expressly authorized to commission all officers. If, therefore, the officer receives his authority and commission from the President, surely the removal follows as coincident." (Ibid., p. 38.)

George Clymer, of Pennsylvania, a signer of the Declaration of Independence and also the Constitution: "The power of removal was an executive power, and as such belonged to the President alone, by the express words of the Constitution: 'The executive power shall be vested in a President of the United States of America.'" (Ibid., p. 39.)

John Vining, of Delaware: "It may be contended that the President shall have the power of removal, because it is he who appoints. The Constitution says he shall nominate. . . . The Senate do not appoint; their judgment only is required to acquiesce in the President's nomination. Where, then, is the natural responsibility placed? Because where that is ought to be the power of removal. The Constitution contemplates no other principle. If we were to insert the contrary one, the Government must go to destruction." (Ibid., p. 40.)

Richard Bland Lee, of Virginia: "The framers of the Constitution . . . divided our Government into three principal branches, with express declarations that all legislative powers shall rest in one, all

Montesquieu's view that the maintenance of independence as between the legislative, the executive, and the judicial branches was a security for the people, had their full approval,[31] and when the Constitution was finally framed distinct powers were vested in the different departments in that all legislative power was vested in the Congress, the executive power in the President, and the judicial power in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. From this division on principle, the reasonable construction of the Constitution must be that the branches of government should be kept separate and distinct in all cases in which they were not interdependent, and the Constitution should be so interpreted and construed. This construction has been confirmed by the Supreme Court of the United States on several occasions.[32]

It will be noted from this text thus far that the bill was discussed in the House at great length and with

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executive in another, and the whole judicial in a third. It is our bounden duty to imitate their great examples and to support the separation which they have formed." (Ibid., p. 41.)

Abraham Baldwin, of Georgia: "The Senate must concur with the President in making appointments, but with respect to the removal they are not associated. No such clause is in the Constitution; and therefore I should conclude that the convention did not choose they should have the power." (Ibid., p. 41.)

James Madison: "If you say that officers shall not be displaced but by and with the advice and consent of the Senate, the President is no longer answerable for the conduct of the officers; all will depend upon the Senate."

As to distribution of powers, he says: "The legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature." (Ibid., p. 43.)

[31] "Madison in the Convention," 2 Farrand, Records of the Federal Convention, 56; Kendall *v.* United States, 12 Peters, 524, 610.

[32] Merriweather *v.* Garrett, 102 U. S. 472, 515; Kilbourn *v.* Thompson, 103 U. S. 168, 190; Mugler *v.* Kansas, 123 U. S. 623, 662.

envious ability, and that the strongest advocate and supporter of the President's constitutional power of removal independently of congressional provision, and without the consent of the Senate, was James Madison. Mr. Madison's masterly and scholarly arguments in support of his contentions had considerable influence in enlisting fellow supporters, as during the First Congress he was a leader of the House as he had been in the convention. He and his associates pointed out with great force the unreasonable character of the view that the convention intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible. He was insistent that Article II, by vesting the executive power in the President, was intended to vest in him also the unrestricted power of appointment and removal of all executive officers other than those expressly provided in that article. This was the intention of the members of the convention, otherwise they would not have separated the legislative from the executive in their final plan, nor would the leaders of the convention, who were later leaders of the First Congress, have supported this view had their opinions been otherwise or their beliefs different.

On July 14, the bill came up before the Senate for discussion. As had been expected by the Members of the House, the division in the Senate was nearly equal.

Mr. Maclay, in his interesting Journal of the Proceedings in the Senate during the First Congress, gives a detailed description of the progress of this bill in the

upper House. When the bill was introduced in the Senate, Mr. Maclay promptly rose to attack the measure. According to his interpretation of the Constitution—

> the approbation of the Senate was certainly meant to guard against the mistakes of the President in his appointments to office. I do not admit the doctrine of holding commissions "during pleasure" as constitutional, and shall speak to that point presently. But supposing for a moment that to be the case, is not some guard equally necessary to prevent improper steps in removals as in appointments? Certainly common inference or induction can mean nothing short of this. It is a maxim in legislation as well as reason, and applies well in the present case, that it requires the same power to repeal as to enact. The depriving power should be the same as the appointing power.[33]

Mr. Ellsworth now proceeded to answer Mr. Maclay in a carefully prepared speech in which he maintained that inasmuch as removal from office is an executive function, the power to do so should be considered as reposing only in the President. By way of a peroration, Mr. Ellsworth declared that if the removal power were not vested solely in the Executive, one might "as well lay the President's head on a block and strike it off with one blow." As Mr. Ellsworth pronounced these words, Mr. Maclay noticed that "he paused, put his handkerchief to his face, and either shed tears or affected to do so." [34]

On July 16, Mr. Maclay observed that the Members in favor of presidential removal were carrying on an active campaign for the conversion of the lukewarm opponents of the bill, and the Vice President, John Adams, even went so far as openly to pass a very severe stricture upon the conduct of Mr. Lee, who had spoken strongly against the measure.[35]

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[33] Maclay, William. Journal of the Debates in the First Senate of the United States (Harris ed.). Harrisburg, Pa., 1881, p. 105.

[34] Ibid., p. 107.

[35] Ibid., p. 109.

It was evident from the debates that the vote in the Senate would be close, and that in all probability the Vice President's casting vote would decide the fate of the bill. From the uncompromising attitude evinced by Mr. Adams it was not difficult to foretell how his vote would be cast. As early as December 6, 1787, he had written to Thomas Jefferson, then in Paris, that the clause in the Constitution giving the Senate a check upon the appointing power was distasteful to him. "The nomination and appointment to all offices," he remarks, "I would have given to the President, assisted only by a privy council of his own creation." [36]

Mr. Adams was also freely corresponding with Mr. Roger Sherman on this subject during the debate in the Senate on this question. His principal objections against permitting the Senate to share in the removal power were:

(1) The admission of the Senate to an equal share of the removal power would lessen the responsibility of the Executive.

(2) The time of the Senate would be divided between legislative and executive functions.

(3) Such a share in the removal power would excite ambition in the Senate and thus introduce corruption.

(4) It would involve the Senate in suspicion and censure without any commensurate gain.

Mr. Sherman in reply took the position that (1) the negative given the Senate in the matter of presidential removal was necessary lest the Executive become a despot; (2) the Members of the Senate being chosen by the State legislatures, would be watchful to prevent any infringement of the rights of the States; and, finally, the Senate, "from the provision made for their appointment, will commonly become of the most respectable citizens in the States for wisdom and probity, and superior to fac-

[36] Adams, John. Works (ed. Charles Francis Adams). Boston, 1853. Vol. VIII, p. 464.

tion, intrigue, or low artifice to obtain appointments for themselves or friends." [37]

This correspondence clearly reveals the desire of Mr. Adams for an increase in the executive power, and on July 18, when the final vote was taken upon the establishment of the Department of Foreign Affairs, with a Secretary to be removable only by the President, the measure was carried through the Senate only by the casting vote of the Vice President himself.[38]

Mr. Ellsworth in the Senate of the First Congress, in defense of the President's prerogative and power of removal, said:

> The three distinct powers, legislative, judicial, and executive, should be placed in different hands. "He shall take care that the laws be faithfully executed" are sweeping words. The officers should be attentive to the President, to whom the Senate is not a council. To turn a man out of office is an exercise neither of legislative nor of judicial power; it is like a tree growing upon land that has been granted. The advice of the Senate does not make the appointment. The President appoints. There are certain restrictions in certain cases, but the restriction is as to the appointment and not as to the removal.

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[37] Adams, John. Works (ed. Charles Francis Adams). Vol. VI, pp. 427–436.

Pitkin, Harriet L. The Washington Spurious Letters. Vol. II, pp. 285–291.

[38] Maclay, William. Journal of the Debates in the First Senate of the United States (Harris ed.). Harrisburg, Pa., 1881, pp. 113–114.

Those voting in favor were Bassett, Carroll, Dalton, Elmer, Henry, Morris, Patterson, Read, Strong, and Adams.

Those voting against were Few, Grayson, Gunn, Johnson, Izard, Langdon, Lee, Maclay, and Wingate.

On the passage of the bill, Senator Ellsworth was present and voted in favor of it, in addition to the above Senators.

Adams, Charles Francis. Appeal to the Whigs. Boston, 1835, p. 32.

The bill was passed as it came from the House, and became law as soon as President Washington signed it. (Act of July 27, 1789, 1 Stat. 28, ch. 4.)

This contention of Mr. Ellsworth is entitled to great weight as to the true intention of the framers of the Constitution, as his view as to the meaning of Article II of the Constitution on the question as to whether the advice of the Senate was necessary to removal, like that of Madison, was repeatedly expressed almost in the very atmosphere of the convention.[39] Mr. Ellsworth was the author of the judiciary act in the First Congress and later became Chief Justice of the United States.

It will be noted that under Article II, section 2, the power of appointment by the Executive is restricted in that the Senate must pass and act upon executive nominees, which acts as a check to any indiscriminate abuse of presidential power, as the Senate can reject any selection of the President. The question now arising is, Does this make the Senate part of the removing power? This question was decided by the negative vote in the House as hereinbefore shown. The history of the clause by which the Senate was given a check upon the President's power of appointment clearly indicates that it was not prompted by any desire to limit removals, and, as already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small States had equal representation with the larger States, power to prevent the President from making too many appointments from the larger States.

Mr. Ellsworth and Roger Sherman, who were delegates from Connecticut, reported to their governor:

> The equal representation of the States in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater States.[40]

The formidable opposition to the Senate's veto on the President's power of appointment indicated that in con-

[39] 2 Bancroft, History of the Constitution of the United States, p. 192.

[40] 3 Farrand, p. 99.

struing its effect it should not be extended beyond its express application to the matter of appointments. This was made apparent by the remarks of Abraham Baldwin, of Georgia, in the debate in the First Congress, where he opposed the construction extending the Senate's power to check appointments to removals from office.

A veto by the Senate upon removals is a much greater limitation upon the executive branch and a much more serious blending of the legislative with the executive than a rejection of a proposed appointment. It is not to be implied.

The rejection of a nominee of the President does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him in seeing that the laws are to be faithfully executed, because the number of aspirants to public office is so great that he has an ample field from which to make selections. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. This check enables the Senate to prevent the filling of offices with undesirables or incompetents, and the Senate can continue exercising their right of rejection until such time as a presidential appointee is acceptable to them.

The power to prevent the removal of an officer who has served under the President is not analogous to the authority to consent to or reject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability, intelligence, or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and practical reasons to the governmental authority which has adminis-

trative control. As hereinbefore mentioned, the power of removal is incident to the power of appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited only by direct expressions where limitation was needed, and as no express limitation was made on the Executive's removal power, it must be conceded that none was intended. Originally Alexander Hamilton's construction and interpretation of Article II was that congressional action was necessary before vacancies, by reason of Executive removals, existed and were complete, but Mr. Hamilton later changed his views [41] when he advanced arguments in connection with Washington's first proclamation of neutrality in the war between France and Great Britain, wherein he held:

> The general doctrine of our Constitution is that the executive power of the Nation is vested in the President, subject only to the exceptions and qualifications which are expressed in the instrument.

He indicated the qualifications in pointing out that the Senate participated in the appointment of officers, in making treaties and the right to declare war and grant letters of marque and reprisals, and with these exceptions, the "executive power of the United States is completely lodged in the President, and this mode of construing the Constitution has indeed been recognized by Congress in formal acts upon full consideration and debate, of which the power of removal from office is an important instance." [42]

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[41] When he was Secretary of the Treasury in Washington's Cabinet.
[42] 7 J. C. Hamilton's Works of Hamilton, pp. 80–81.

The President is a representative of the people, the same as are the Members of both Houses of Congress, and it may be at some times on subjects that the President, elected by all the people, is rather more representative of them all than are the Members of either body of the Legislature whose constituencies are local rather than national; and as the President is elected for a term of four years with the mandate of the people to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.

Thus, at the end of this important debate, four conclusions had been arrived at:

(1) That the appointing power includes the removing power.

(2) That both of these powers belong to the President, the Senate having simply a negative on appointments.

(3) Where the tenure of office has not been provided for by the Constitution, the office is held at the pleasure of the appointing power.

(4) Heads of departments are not "inferior" officers.

In discussing this question of presidential removal, James Kent in his Commentaries on American Law observes as follows:

> This question has never been made the subject of judicial discussion, and the construction given to the Constitution of 1789 has continued to rest on this loose incidental declaratory opinion of Congress and the sense and practice of government since that time. . . . It is a striking fact in the constitutional history of our Government that a power so transcendent as that is, which places at the disposal of the President alone the tenure of every executive officer appointed by the President and the Senate, should depend upon inference merely and should have been gratuitously declared by the Federalist, and should have been supported and acquiesced in by some of these distinguished men who questioned or denied the power of Congress even to incorporate a national bank.[43]

[43] Kent, James. Commentaries on American Law, vol. 1, pp. 310–311. (New York, 1832.)

A few years later, Mr. Joseph Story in his Commentaries on the Constitution of the United States, examined in detail this question of presidential removal. Alluding to the fact that No. 77 of the Federalist papers expressly states that the President and the Senate have equal shares in the power of removal, Mr. Story remarks that this doctrine—

had a most material tendency to quiet the just alarms of the overwhelming influences, and arbitrary exercise of this prerogative of the executive, which might prove fatal to the personal independence and freedom of opinion of public officers as well as to the public liberties of the country. Indeed, it is utterly impossible not to feel that, if this unlimited power of removing does not exist, it may be made, in the hands of bold and designing men of high ambition and feeble principles, an instrument of the worst oppression and most vindicative vengeance. The Federalist admits by the clearest implication the full force of the argument thus addressed to such a state of Executive prerogative. Its language is: "The consent of the body [the Senate] would be necessary to displace as well as to appoint. . . ." No man can fail to perceive the entire safety of the power of removal if it must thus be exercised in conjunction with the Senate. That the final decision of this question, so made, was greatly influenced by the exalted character of the President then in office was asserted at the time and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in this decision; and it constitutes, perhaps, the most extraordinary case in the history of the Government of a power conferred by implication upon the Executive by the assent of a bare majority of Congress which has not been questioned on many other occasions. Even the most jealous advocates of the State rights seem to have slumbered over this vast reach of authority.[44]

[44] Story, Joseph. Commentaries on the Constitution of the United States, vol. 2, pp. 400–404.

Chapter III

THE STRUGGLE FOR CONGRESSIONAL CONTROL OVER THE TREASURY DEPARTMENT

The statutes which established the three Departments of State,[1] War,[2] and the Treasury[3] reveal striking differences in phraseology. Only the Departments of State and War are styled "executive." Their secretaries were evidently intended to be within the direct control of the President himself. As regards the Treasury Department, however, the case appears to have been quite different,

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[1] *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there shall be an Executive Department, to be denominated the Department of Foreign Affairs, and that there shall be a principal Officer therein to be called the Secretary for the Department of Foreign Affairs, . . . (Statute I, July 27, 1789. Altered by act of September 15, 1789, United States Statutes at Large, vol. 1, 1st to 5th Cong., 1789–1799, pp. 28–29.)

The act of September 15, 1789, changing the Department of Foreign Affairs to the Department of State, reads: . . . That the Executive Department, denominated the Department of Foreign Affairs, shall hereafter be denominated the Department of State, and the principal officer therein shall be called the Secretary of State. (United States Statutes at Large, vol. 1, 1st to 5th Cong., 1789–1799, Ch XIV, sec. 1, pp. 68–69.)

[2] . . . That there shall be an executive department to be denominated the Department of War, and that there shall be a principal officer therein, to be called the Secretary for the Department of War. (Ibid. Ch. VII, sec. 1, pp. 49–50. August 7, 1789.)

[3] That there shall be a Department of Treasury, in which shall be the following officers, namely: a Secretary of the Treasury, to be deemed head of the department; a Comptroller, an Auditor, a Treasurer, a Register, and an Assistant to the Secretary of the Treasury, which assistant shall be appointed by the said Secretary. (Ibid. Ch. XII, sec. 1, pp. 65–67. September 2, 1789.)

and "it seems that Congress planned to create an agent, not for the Executive, but for itself. Both by actual phraseology and by implication the head of this department was subject to the legislature, and nowhere does the statute confer upon the President authority to assign duties to the Secretary of the Treasury. . . . In a Cabinet meeting Hamilton once observed 'that as to his department the act constituting it had made it subject to Congress in some points, but he thought himself not so far subject as to be obliged to produce all the papers they might call for.' That interpretation was one of Hamilton's own, not warranted by the wording, and certainly inconsistent with the general tone of the law itself."[4] The Secretary was to report from time to time direct to Congress as regards the state of affairs concerning his department and not to the President or even through the President, as he (the President) had no supervision over that department. Congress alone had complete jurisdiction over the Treasury Department, including its head and other officers. The acts creating both the State and War Departments, however, literally provided for the appointment of the Secretaries, "who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to them, by the President of the United States." These departments were under the immediate supervision of the Executive and their respective Secretaries were to be appointed by the President by and with the advice and consent of the Senate.

In all probability, the explanation of the differences in the phraseology of these statutes may be found in the precedents that had been established in colonial times.

Before the Revolutionary War, in 1689, the financial administration was within the control of the lower house of the provincial legislatures but soon after the war the appointment of *all administrative officers* by the provin-

[4] Harlow, Ralph V. The History of the Legislative Methods in the Period Before 1825. New Haven, 1917, pp. 132–133.

cial assemblies became common "as a natural result of their theory of financial control." "The money raised by public taxation belonged to the people, and their representatives had, therefore, the right to determine how it should be spent, and to provide the necessary safeguards for such expenditure." [5]

The program of the popular party of Massachusetts, which was passed by the general court of 1694, not only provided for the appointment of all civil officers by the assembly, but the fixing of official salaries, the mode of raising revenues, and all expenditures of money. While this program was disallowed by the Crown, yet it did not prevent the assembly from carrying out substantially this policy, together with the further assumption of appointing a provisional treasurer.[6]

In 1691 the Governor of Barbadoes complained that the treasurer was appointed by act of assembly, and that the lower house claimed the nomination as "absolutely its own." In 1693 the Virginia council refused to accept a bill from the Burgesses for appointing a treasurer; but after 1704 the treasurer of that province was regularly appointed by act of assembly. In New York the same policy was adopted during the early years of the eighteenth century, after the passage of resolutions referring to previous misapplications of funds; and in 1715 the governor was convinced that resistance to that method of appointment was no longer practicable. Similar appointments by the assembly were made in the proprietary governments of Pennsylvania, the Jerseys, and South Carolina, and for a time at least in the temporary royal province of Maryland. In South Carolina the public receiver or treasurer had been appointed by act of assembly at least as early as 1691, and by the time Queen

[5] Greene, E. B. Provincial America, 1690–1740, New York, 1905, p. 76.

[6] Ibid., pp. 74–75.

Anne came to the throne practically all "the colonial assemblies were enforcing their claim not merely to lay taxes and determine expenditures, but also to appoint the chief financial officers of the province." [7]

It is interesting to note that during the Constitutional Convention of 1787 only one of the plans submitted provided for the specific mode of appointing a Treasurer, and that by *ballot*.[8]

On August 6 of the same year the Committee of Detail reported a plan which made specific provision "to appoint a Treasurer by ballot." [9] This section of the plan was again taken up for discussion August 17, when Mr. Gorham moved to insert "joint" before ballot, as he thought it "more convenient, as well as reasonable," to have both Houses act upon and concur in the appointment "than to require the separate concurrence of the Senate." This motion was seconded by Charles Pinck-

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[7] Greene, E. B. Provincial America, 1690–1740, New York, 1905, p. 77.

[8] Charles Pinckney's plan, provided that "The Legislature of the United States shall have the power to appoint a Treasurer, by ballot." (Madison, James. Journal of Constitutional Convention (ed. E. H. Scott), Chicago, 1898. Article VI, pp. 67–68.)

Virginia plan: No Treasurer was made reference to, but the President was to "enjoy the executive rights vested in Congress by the Confederation." (Ibid. Par. 7, p. 62.)

New Jersey plan: "That the Executive, besides their general authority to execute the Federal acts, ought to appoint all Federal officers not otherwise provided for, . . ." While no Treasurer was specifically mentioned in this plan, yet if one was to be had, the Executive was to appoint him. (Ibid. Par. 4, p. 165.)

Alexander Hamilton's plan: The authorities and functions of the Executive . . . "to have the sole appointment of the heads of chief officers of the Department of Finance, War, and Foreign Affairs; to have the nomination of all other officers (Ambassadors to foreign nations included), subject to the appropriation or rejection of the Senate; . . ." If a Treasurer was to be had under this plan, the Executive was to appoint him. (Ibid. Par. IV, pp. 185–186.)

[9] Ibid. Article VII, Sec. 1, p. 454. See Documentary History of the Constitution, Washington, D. C., 1900, v. III, pp. 449.

ney, who was strongly in favor of having a Treasurer appointed by ballot. Mr. Sherman opposed it, as favoring the larger States, but on a vote to insert the word "joint" the motion was carried 7 to 3.[10] Mr. Read, however, was for striking out the entire clause, as he wanted the appointment for a Treasurer, as of other officers, left to the Executive. In support of his motion he stated "the legislature was an improper body for appointments. Those of the State legislatures were a proof of it. The Executive being responsible, would make a good choice." Colonel Mason, in opposition to Mr. Read's motion, desired it might be considered to whom the money would belong; if to the people, the legislature, representing the people, ought to appoint the keepers of it. Mr. Read's motion was lost by a 4 to 6 vote.[11]

On September 12 Doctor Johnson, from the Committee of Style and Arrangement, reported a digest of the plan,[12] and according to Article I, section 6, thereof it was provided that "the Congress may by joint ballot appoint a Treasurer."[13]

When this report was again taken up, September 14,[14] Mr. Rutledge moved "to strike out this power and let the Treasurer be appointed in the same manner with other officers." Both Messrs. King and Gorham, of Massachusetts, were opposed to this motion, as they were strongly in favor of the two mature plans providing for the appointment of a Treasurer by the joint ballot of the two houses of the legislature, because, as they remarked, "the people are accustomed and attached to that mode

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[10] N. H., Mass., Pa. Va., N. C., S. C. and Ga. aye—7: Conn., N. J., Md., and Va. no—3. Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, p. 544.

[11] Pa., Del., Md. and S. C. aye—4: N. H., Mass., Conn., Va., N. C. and Ga. no—6. (Ibid. p. 544.)

[12] Ibid., pp. 699–713. (See Documentary History of the Constitution, Washington, D. C., 1900, Vol. III, p. 724.)

[13] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, Art. I, sec. 8, p. 704.

[14] Ibid., p. 724.

of appointing treasurers and the innovation will multiply objections to the system." They were also of the belief that if agreed to, "it would have a mischievous tendency." [15]

Mr. Gouverneur Morris remarked that "if the Treasurer be not appointed by the legislature, he will be more narrowly watched, and more readily impeached." Mr. Sherman thought that inasmuch "as the two Houses appropriated money, it was best for them to appoint the officer who was to keep it; and to appoint him as they make the appropriation, not by joint, but several votes."

General Pinckney was a strong advocate in giving this power to the Executive, and in speaking on the question stated that as "the treasurer is appointed by joint ballot in South Carolina, the consequence is that bad appointments are made, and the legislature will not listen to the faults of their own officer." The motion of Mr. Rutledge was carried by an 8 to 3 vote, which gave the President the power to appoint a treasurer, if later such an office was to be created.[16]

It is probable, therefore, that the arrangement of the Secretary of the Treasury's position in 1789 under the restraint of Congress was in a great measure owing to the action of the convention in permitting the President to name the national Treasurer.[17]

With regard to this question of the wording of the statutes of 1789, John Quincy Adams, in his *Memoirs,* states that President Monroe informed his Cabinet at a meeting on January 12, 1819, that the difference in the phrase-

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[15] Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, p. 724. Elliot, Jonathan. Debates on the Adoption of the Federal Constitution, Washington, 1845, vol. 5, p. 542. Learned, H. B. The President's Cabinet, New Haven, 1912, p. 102.

[16] N. H., Conn., N. J., Del., Md., N. C., S. C. and Ga. aye—8: Mass., Pa. and Va. no—3. Madison, James. Journal of Constitutional Convention (ed. E. H. Scott). Chicago, 1898, p. 724.

[17] Learned, H. B. The President's Cabinet, New Haven, 1912, p. 103.

ology of the statutes was due to the fact that the law establishing the Treasury Department "was drawn by A. Hamilton, who was himself to be the Secretary, and whose object was to establish a direct intercourse between the members of the legislature and himself for his own purposes." [18] The President questioned the right of Congress in calling directly upon the Secretary of War for a report,[19] and expressed his opinion that the call was "irregular, and not conformable to the spirit of the Constitution of the United States, the principle of which was a single Executive." [20]

During the past few years it was observed that "the practice of calling directly from either House of Congress upon the other heads of departments for reports" had grown,[21] and that the practice was "irregular," and "as the heads of departments were executive officers under the President, it was to be considered whether the President himself was not responsible for the substances of their reports." [22]

Without discussing the amount of credence to be placed in President Monroe's explanation of the statutory differences, it is a fact that from the time of Hamilton onward the practice became fixed for the Secretary of the Treas-

[18] Adams, J. Q. Memoirs, Philadelphia, 1875, vol. 4, p. 217.

[19] Of the two questions submitted by the President to the Cabinet, "one was upon a report from the Secretary of War, Calhoun, prepared in obedience to a resolution of the House of Representatives, passed at the last session of Congress, for the application of the means within the power of Congress, for making roads and canals for military purposes." (Adams, J. Q. Memoirs, Philadelphia, 1875, vol. 4, p. 217.)

[20] Adams, J. Q. Memoirs, Philadelphia, 1875, vol. 4, p. 217.

[21] Mr. Adams observed that "the practice of direct calls from either House of Congress upon all the heads of departments for reports was not of recent origin, having existed ever since the establishment of the Government." He gave Mr. Jefferson's report upon weights and measures and General Knox's report upon a militia system as instances.

[22] Adams, J. Q. Memoirs, Philadelphia, 1875, vol. 4, p. 217.

ury not only to report directly to Congress but to do so without the knowledge or consent of the Executive. During Madison's administration this practice was the cause of great confusion, for in one particular instance, upon the request of the House of Representatives, Secretary Gallatin rendered a report upon financial matters that was entirely out of harmony with Madison's ideas upon the subject. Upon being questioned by James Monroe upon the extraordinary nature of this report, Madison admitted that the report "had been equally unexpected and displeasing to him, but that he had not seen it before it was presented to the House, and that, from the practice having originated with General Hamilton, it was supposed that there were considerations of delicacy for its being withheld from the President until after having been presented to Congress." [23]

On May 4, 1826, Mr. Benton, from the select committee to which was referred the proposition to inquire into the expediency of reducing the patronage of the executive government of the United States, made a somewhat elaborate report, and submitted with the report six different bills as a means of accomplishing the reduction.[24]

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[23] Adams, J. Q. Memoirs. Philadelphia, 1875, vol. 4, p. 501.

[24] The 6 bills were:

1. To regulate the publication of the laws of the United States and of public advertising.

2. To secure in office the faithful collectors and disbursers of the revenue and to displace defaulters. This bill provided "That in all nominations made by the President and Senate, to fill vacancies occasioned by an exercise of the President's power to remove from office, the fact of the removal shall be stated to the Senate at the same time that the nomination is made, with a statement of the reasons for which such officers may have been removed."

3. To regulate the appointment of postmasters. This bill provided that "No person shall be appointed postmaster to any post office . . . except by and with the advice and consent of the Senate, upon a nomination of the President."

4. To regulate the appointment of cadets.

The committee, Mr. Benton stated, have only opened the subject by the submission of the report and the six bills, "and that nothing more can be done at this time than to lay the foundation of a system to be followed up and completed hereafter."

In giving the executive department too much power as regards appointments and removals, he states that "in coming to the conclusion that Executive patronage ought to be diminished and regulated on the plan proposed, the committee rest their opinion on the ground that the exercise of great patronage in the hands of one man has a constant tendency to sully the purity of our institutions and to endanger the liberties of the country."

The report showed the number of employees in the Government service and that in nearly every department too many were employed to carry on the work. A tabulated list of 175 officers employed in the customs at New York, together with their respective compensations, was included in the report, and he stated while New York was a great city, yet the customs only represented a "branch, a mere prong of Federal patronage," in that city. In going to another extreme, he showed that 41 officers supported and employed by a single branch of Federal patronage in Norfolk to collect an annual decreasing revenue of $64,712.27, which was only a borough town of some 5,000 whites. He was afraid that if the Executive patronage was not reduced and checked "by the vigorous interpretation of Congress, it must go on increasing, until a Federal influence, in many parts of the Confederation, will predominate in elections as completely as British influence predominates in the elections of Scotland and Ireland, in rotten borough towns, and in the naval stations of Portsmouth and Plymouth."

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5. To regulate the appointment of midshipmen.

6. To prevent military and naval officers from being dismissed the service at the pleasure of the President. (19th Cong., 1st sess., May 4, 1826, U. S. Senate.)

This same question arose on numerous occasions during the administrations of succeeding Presidents, and in Jackson's time a sharp controversy broke out with regard thereto.

In 1833, President Jackson directed his Secretary of the Treasury, William J. Duane, to issue an order providing that henceforth all Government funds should be deposited in specified State banks instead of in the Bank of the United States. These instructions were made on account of Jackson's hostility toward the Bank of the United States, which, under a charter granted by Congress in 1816, was to be a repository for Government funds. Jackson charged that the bank "was unconstitutional because Congress had no power to create a corporation; because it withdrew capital from the control of the State; because it bought real estate without the consent of a State, which the Federal Government itself could not do"; and that "it was dangerous to liberty because through its officers, loans, and participation in politics it could build up or pull down parties or men; because it created a monopoly of the money power; because much of the stock was owned by foreigners; because it would always support him who supported it; and because it weakened the State and strengthened the General Government." [25] In short, the bank constituted "a permanent electioneering engine" which sought "to control public opinion through the distress of some and the fears of others." [26] On account of these charges, Jackson was for having the funds of the Government removed from the bank and distributed to specific State banks, and which would offer the best means of stabilizing the currency, which was then none too steady. With this determination, it was the duty of, and he so instructed, the Secretary of the Treasury to arrange for the removal of

[25] Bassett, J. S. Life of Andrew Jackson, New York, 1911, vol. 2, pp. 607–608.

[26] Ibid., p. 646.

the deposits. Duane, however, willfully evaded the instructions of the President on the theory that before the funds could be removed he at first would have to consult the Congress. One of the provisions of the bank's charter stipulated that the Secretary of the Treasury might remove the deposits from the bank, but he should "immediately lay before Congress, if in session, and if not, immediately after the commencement of the next session, the reasons for such order or direction." [27] Duane maintained his stand in refusing to comply with Jackson's instructions by this charter provision, and after Jackson's repeated requests of Duane to remove the deposits, but without avail, he became very much annoyed and impatient, and early in September, as a final stand, "pressed Duane for final action; and as the Secretary still held that Congress should be consulted, the President hesitated no longer" and sent a formal note of dismissal to Duane September 23.[28]

It was quite apparent, therefore, that, notwithstanding the wording of the statute establishing the Treasury Department in 1789 and the subsequent practice of the Secretaries of the Treasury in reporting to Congress without the previous knowledge of the Executive, President Jackson did not believe that the Secretary of the Treasury was therefore exempt from supporting the Chief Executive in all matters of public policy. By law the Secretary was removable by the President, and this right Jackson promptly exercised.[29]

Immediately upon the dismissal of Secretary Duane a heated controversy arose in Congress relative to presidential removal, and in the Senate a resolution was passed declaring that the President in removing the deposits

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[27] Bassett, J. S. Life of Andrew Jackson. New York, 1911, vol. 2, pp. 585–586.

[28] Ibid., p. 644.

[29] Richardson, James D. Messages and Papers of the Presidents. Washington, D. C., vol. 3, p. 3 ff.

from the United States Bank had exceeded his constitutional authority.

Henry Clay, in speaking in favor of his resolution of censure, reviewed the establishment of the executive department, and with reference to the Treasury Department he observed:

> Congress reserved to itself the control of that department. It refused to make it an executive department. Its whole structure manifests cautious jealousy and experienced wisdom. The Constitution had ordained that no money should be drawn from the Treasury but in consequence of appropriations made by law. It remained for Congress to provide how it should be drawn. And that duty is performed by the act constituting the Treasury Department. . . . The Secretary is to report to Congress and to each branch of Congress. . . . Thus it is evident that the President, neither by the act creating the Treasury Department nor by the bank charter has any power over the Public Treasury. . . . But the President himself says that "upon him has been devolved, by the Constitution and the suffrage of the American people, the duty of superintending the operation of the executive departments of the Government and seeing that the laws are faithfully executed." If there existed any such double source of executive power, it has been seen that the Treasury Department is *not* an executive department, the Secretary is the agent, a representative of Congress, acting in obedience to their will, and maintaining a direct intercourse with them." [30]

On February 5, 1834, the resolution censuring the action of the President in withdrawing the deposits was passed by the Senate, but such tactics resulted in merely a barren victory, for "already the country was going against the bank." [31]

The Governor of Pennsylvania, who previously was friendly toward the bank, sent a message to the State legislature February 26 charging the bank with producing the pressure in the money market "to accomplish

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[30] Gales and Seaton's Register of Debates in Congress, Vol. X, pt. 1, p. 66.

[31] Bassett, J. S. Life of Andrew Jackson. New York, 1911, vol. 2, p. 652.

certain objects indispensable to its existence,"[32] which had the support of the party in that State. In New York, at the governor's suggestion, the State issued six millions of stock to be loaned to the banks to relieve the embarrassment of the merchants.[33] This condition was likewise due to the pressure in the financial market brought about by the bank, and similar conditions were prevalent throughout the entire country.

Clay, however, was determined not to give up the fight against the President, and particularly against presidential removal. In a speech on March 7, 1834, he declared that he had examined the Constitution with the utmost care and attention of which he was capable, and he felt firmly convinced that it did not grant any such power to the President.[34] This was followed up by his introducing four resolutions,[35] the substance of which was that the

[32] Bassett, J. S. Life of Andrew Jackson. New York, 1911, vol. 2, p. 652.

[33] Ibid., p. 652.

Hammond. History of New York, Vol. II, p. 441.

Alexander. Political History of New York, Vol. I, p. 400.

[34] Gales and Seaton's Register of Debates in Congress, Vol. X, pt. 1, p. 834.

[35] 1. *Resolved,* That the Constitution of the United States does not vest in the President power to remove at his pleasure officers under the Government of the United States whose offices have been established by law.

2. *Resolved,* That, in all cases of offices created by law, the tenure of holding which is not prescribed by the Constitution, Congress is authorized by the Constitution to prescribe the tenure, terms, and conditions on which they are to be holden.

3. *Resolved,* That the Committee on the Judiciary be instructed to inquire into the expediency of providing by law that in all instances of appointment to office by the President, by and with the advice and consent of the Senate, other than diplomatic appointments, the power of removal shall be exercised only in concurrence with the Senate, and, when the Senate is not in session, that the President may suspend any such officer, communicating his reasons for the suspension to the Senate at its first succeeding session; and if the Senate

Constitution did not bestow upon the President any right to remove executive officers at pleasure, and that Congress should provide by law the nonremoval of all officers of the United States (save diplomatic appointments) except with the consent of the Senate.

Benton, in opposition, moved to expunge the resolutions on the ground that Clay's charge that the President assumed power illegally was "false, unjust, and passed without giving the accused an opportunity to be heard." [36] "The only overt act to be alleged in support of Clay's charge was the dismissal of Duane, which was not unconstitutional. Benton's indictment was essentially true and Clay's impetuousity had placed his party in a bad position." [37]

Through the efforts of Benton, Jackson won the good grace of practically the entire country, and when Benton's motion to expunge the condemnatory resolutions of Clay's came up for vote in the Senate, January 16, it was carried 24 to 19,[38] which completely vindicated Jackson in his stand against the bank.

In the following year, 1835, John C. Calhoun introduced a bill to reduce the executive patronage, as he was bitterly opposed to giving to the President the sole dis-

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concur with him the officer shall be removed, but if it do not concur with him the officer shall be restored to office.

4. *Resolved*, That the Committee on the Post Office and Post Roads be instructed by law to inquire into the expediency of making provision by law for the appointment, by and with the advice and consent of the Senate, of all deputy postmasters whose annual emoluments exceed a prescribed amount.

Gales and Seaton's Register of Debates in Congress, Vol. I, pt. 1, p. 836.

[36] Bassett, J. S. Life of Andrew Jackson. New York, 1911, vol. 2, pp. 653–654.

[37] Ibid., p. 654.

[38] Ibid., p. 654. (See Benton, Thirty Years' View, pp. 524–550, 717–727.)

criminate power of appointing and removing incumbents to the vast field of offices which were then subject to the pleasure of the President.

In support of his bill, Mr. Calhoun submitted a lengthy report[39] on this subject, and indicated therein that 60,294 officers, agents, and other employees were in the Government's employ and that all of them "hold their places directly or indirectly from the Executive, and, with the exception of the judicial officers, are liable to be dismissed at his pleasure." He further showed that the number of employees had greatly increased in the past few years and that the disbursements had likewise increased twofold, which contributed to a great degree the increased patronage. He also pointed out that the patronage was greatly increased on account of the practice "of removing from office persons well qualified, and who had faithfully performed their duty, in order to fill their places with those who are recommended on the ground that they belong to the party in power." While he did not wish to censure any particular administration, yet he said "it is only within the last few years that removals from office have been introduced as a system, and for the first time, an opportunity has been afforded of testing the tendency of the practice and witnessing the mighty increase which it has given to the force of Executive patronage, and the entire and fearful change . . . it is effecting in the character of our political system."

"Were a premium offered," he said, "for the best means of extending to the utmost the power of patronage; to destroy the love of country, and to substitute a spirit of subserviency and man worship; to encourage vice and discourage virtue; and, in a word, to prepare for the subversion of liberty, and the establishment of des-

[39] Mr. Calhoun's Report (23d Cong., 2d sess., U. S. Senate, Feb. 9, 1835).

potism, no scheme more perfect could be devised, and such must be the tendency of the practice, with whatever intention adopted or to whatever extent pursued."

He recalled the act of May 15, 1820, which provides, among other things, that, from and after its passage, all district attorneys, collectors, and other disbursing officers therein mentioned to be appointed under the laws of the United States shall be appointed for a term of four years, and stated that the object of this act was to withhold "any reappointments from those who had not faithfully discharged their duty." The purpose of that act, he asserted, had been defeated or at least evaded, as "faithful performance of duty no longer insures a renewal of appointment," and that those affiliated with the party in power were given the places without regard to fitness.

He laid particular stress on the fact that the President had altogether too much power in filling and removing from office employees which necessarily increased his patronage. A great amount of this patronage has been increased on account of the increase in the "public funds, and, with it, the currency of the country."

In considering the question of the expediency of reducing the Executive patronage, which, he states, "at best, is but a necessary evil; that its tendency, where it is not effectually checked and regulated, is to debase and corrupt the community," he recommended that it be done immediately, for if present conditions are to prevail "it is a certain indication of the near approach of irresponsible and despotic power." The first and most simple, and usually the most certain mode of accomplishing this, "is to reduce the public income, the prolific source from which it almost exclusively flows." That too great an Executive power being vested in a single individual is destructive to a sound government, he contends by saying: "If we turn our eyes to the Government, we shall find that, with this increase of patronage, the entire character and structure of the Government itself is under-

going a great and fearful change, which, if not arrested, must, at no distant period, concentrate all its powers in a single department."

In the discussion that followed, Calhoun, Clay, and Webster all took common ground against presidential removal.[40] Mr. Clay pointed out that all appointees coming directly under the will of the Executive necessarily had to yield their own political convictions to the mandates of the Chief Executive, which applied to the military and naval service as well as to thousands of civil offices throughout the country. In speaking of the military officers, he said that "if any officer should happen to differ with the President on some political points, he would be reserved," . . . he would have to "become warm and active, or be dismissed." As to civil offices, he said "what a multitude of officers, so situated, did the Post Office Department, the customhouses, and the land offices furnish. They were a well-regulated body, a corps d'armee, a rallying point for political action, forming committees of correspondence all over the country. It was a revival of the institutions of feudal times; filling the land with barons of feudation."[41]

Webster, in a speech upon the appointing and removing power, asserted that after a careful investigation he had discovered that the uniform practice that had obtained in the United States since 1789 with regard to removals from office was simply for the President to send to the Senate a new nomination, which, if confirmed, ipso facto removed the incumbent from office. "In all the removals which have been made," he declared, "they have generally been effected simply by making other appointments. I can not find a case to the contrary. . . . I have gone into these details and particulars, sir, for the purpose of showing that not only in the nature of things,

[40] Gales and Seaton's Register of Debates in Congress, Vol. XI, pp. 361–392, 418–491, 513–539, 552–571.

[41] Congressional Globe (23d Cong., 1st and 2d sess., vol. 11, p. 260).

but also according to the practice of the Government, the power of removal is incident to the power of appointment. It belongs to it, forms a part of it, or results from it." [42]

Mr. Webster's speech was the subject of bitter attack by Charles Francis Adams, who opened his attack by observing that—

> The Constitution of the United States has now been in operation nearly half a century, during which period many doutbful points in its construction have been thought to have been settled; . . . and . . . of all the questions made since 1789 to this day, not one can be cited which has received so thorough and labored examination from the contemporaries and framers of the Constitution as that upon the removing power of the President; not one ever obtained a more decisive and concurring voice of confirmation from all departments of the Government. . . . The House of Representatives, after elaborate discussion, established it. The Supreme Court of the Union has virtually confirmed it. . . . If anything could ever be said to be established in the United States, this is that thing. Yet this question is again opened in the principle of the patronage bill of the Senate.[43]

Mr. Webster had already admitted that this question was now "settled by construction, settled by precedent, settled by the practice of the Government, and settled by statute," but would not admit that it was settled by reasoning.

To Mr. Adams and the old "Whigs" it was common knowledge that there existed considerable doubt in the minds of the "New Whigs" as to just the true interpretation of the Constitution relative to the appointing and removal power of the Chief Executive, and as Mr. Webster was of the new party, his speech raised the question as to whether or not "the Constitution did intend to give the power of removal from office to the President alone or did it intend to subject it, together with the power of appointment, to the advice and consent of the Senate?" According to Mr. Webster's speech, his ideas as to the

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[42] Webster, Daniel. Works. Boston, 1866, vol. 4, pp. 189–190.

[43] Adams, Charles Francis. Appeal to the Whigs (Boston, 1835), p. 1.

distribution of power to the three branches of government were—

That the Constitution declares that the executive power shall be vested in the President; but the first question which then arises is, What is executive power? What is the degree and what the limitations? Executive power is not a thing so well known and so accurately defined as that the written Constitution of a limited government can be supposed to have conferred it in the lump. What is executive power? What are its boundaries? What model or example had the framers of the Constitution in their minds, when they spoke of "executive power"? Did they mean executive power as known in England, or as known in France, or as known in Russia? Did they take it as defined by Montesquieu, by Burlamaqui, or by De Lolme? All these differ from one another as to the extent of the executive power of the Government. What then was intended by "the executive power"? Now, sir, I think it perfectly plain and manifest that although the framers of the Constitution meant to confer executive power on the President, yet they mean to define and limit that power and to confer no more than they did thus define and limit. When they say it shall be vested in a President, they mean that one magistrate, to be called a President, shall hold executive authority; but they mean further that he shall hold his authority according to the grants and limitations of the Constitution.

They did not intend, certainly, a sweeping gift or prerogative. They did not intend to grant to the President whatever might be construed or supposed or imagined to be executive power: and the proof that they meant no such thing is that immediately after using these general words they proceed, specifically, to enumerate his several distinct and particular authorities; to fix and define them; to give the Senate an essential control over the exercise of some of them; and to leave others uncontrolled. By the executive power conferred on the President, the Constitution means no more than that portion which itself creates, and which it qualifies, limits, and circumscribes.[44]

In taking issue with Mr. Webster, Mr. Adams maintains that "the approval of removals was not a power expressly granted by the Constitution to the Senate, and is therefore entirely within the action of the uniform

[44]Adams, Charles Francis. Appeal to the Whigs (Boston, 1835), pp. 3–4.

principle reserving to the different departments the powers respectively granted to them. It remains with the executive power." [45]

Mr. Webster, in differing with Mr. Adams, says:

The error of this argument, if I may venture to call it so, considering who used it, lies in this: It supposes the power of removal to be holden under the general grant of executive power. Now, it is certain that the power of appointment is not holden under the general grant, because it is particularly provided for and is conferred in express terms on the President and Senate. If, therefore, the power of removal be a natural appendage to the power of appointment, then it is not conferred by the general words granting executive power to the President but is conferred by the special clause which gives the appointing power to the President and Senate. So that the spirit of the very rule on which the argument of 1789, as I have stated it, relies appears to me to produce a directly opposite result; for if exceptions to a general rule are to be taken strictly when expressed, it is still more clear that they are not to be implied, without evident and clear grounds, when they are not expressed at all; and as the general power of appointment is confessedly given to the President and Senate, no exception is to be implied in favor of one part of that general power—namely, the removing part—unless for some obvious and irresistible reason. In other words, this argument which I am answering is not sound in its premises and therefore not sound in its conclusion, if the grant of the power of appointment does naturally include also the power of removal, when this last power is not otherwise expressly provided for; because, if the power of removal belongs to the power of appointment or necessarily follows it then it has gone with it into the hands of the President and Senate, and the President does not hold it alone, as an implication or inference from the grant to him of general executive powers.

The true application of that rule of construction, thus relied on would present the argument, I think, in this form: "The appointing power is vested in the President and Senate; this is the general rule of the Constitution; the removing power is part of the appointing power; it can not be separated from the rest but by supposing an exception was intended; but all exceptions to general rules are to be taken strictly, even when expressed; and for a much stronger reason

[45] Adams, Charles Francis. Appeal to the Whigs (Boston, 1835), p. 11.

they are not to be implied when not expressed unless inevitable necessity of construction rquires it." [46]

From the foregoing it would appear that Mr. Webster believed the appointing and removal authority strictly defined and that the President enjoys, subject to limitation, the use of this power, and that the "executive power is not a thing so well known and so accurately defined, as that the written Constitution of a limited government can be supposed to have conferred it in the lump." [47]

Mr. Adams, on the other hand, maintains that the executive power is well defined and that both the appointing and removal authority rests conclusively in the President and that this power is conferred "in the lump," and he further points out, in support of his contentions, that under the Constitution "The executive Power shall be vested in a President" who "shall take care that the laws be faithfully executed."

Mr. Adams further contends that in filling an office under the Constitution there are three distinct acts necessary before any assumption of duties on the part of the appointee:

(1) That there must be a nomination, and that is the sole act of the President.

(2) That there must be an appointment, and that is the act of the President, subject to the consent of the Senate.

(3) That there must be a commissioning, and that is the sole act of the President.

This being true, he maintains that the power of appointment rests solely in the Executive and not in the Executive and Senate. The provision in the Constitution that the President shall have power to nominate "by and with the consent of the Senate" only confers upon the Senate a negative which that body has the right to exercise in the disapproval of any nominee, and as soon

[46] Adams, Charles Francis. Appeal to the Whigs (Boston, 1835), pp. 11–12.

[47] Ibid., p. 13.

as a rejection is made by the Senate, the President immediately nominates another.

Mr. Adams based his attack upon the principles maintained by the modern Whigs in their construction of the Constitution, which were in decisive contrast to those of the old and ancient Whigs, who held that there was a separation of legislative and executive power; that the President appoints and the Senate advises; that to vest the power of removal in the Senate would be subversive of the true principles of the Constitution; and that they deny that the mere right of regulating office in the legislature can extend so far as in any degree to affect the exercise of the President's legitimate power of appointment and removal.

Mr. Webster and his followers, on the other hand, claimed that there was no separation of legislative and executive power, because the line between them can not be accurately defined, and that the three departments of the Government are in name only; that the President and Senate appoints; that the power of removal rests with the Senate; and that Congress, by the mere right of regulating office, can make every officer hold his place for life or for any term of years without reference to the powers of the Executive.

Mr. Adams could hardly believe that Mr. Webster could have placed any such interpretation on the Constitution and openly confess such utter ignorance on a matter with which he was considered an authority. In commenting on this he says: "It is true he (Mr. Webster) stands high in the community, and his judgments upon law are entitled to, and possess, very great weight," but his "speech is made up of principles entirely unsound and dangerous," and there is much in it that "coming from any other person than one so highly distinguished could have met with nothing but the most unqualified condemnation." His concluding remarks showed that he was very much angered, when he said, "That this thing

of rottenness should have been picked out of the hole, where it had been left to moulder, should have been justified and defended by its former opponents, and its most fatal principle avowed as the guide for future movements, is really too serious a matter to be met with trifling." [48]

It is interesting to observe that the position taken by Mr. Adams in his interpretation of the Constitution appertaining to both the appointment and removal power has been sustained by the Chief Executives to this day, and the courts during recent and present times have unheld his version of this power in its every phase. His Appeal to the Whigs has only of late been accorded a place alongside the intellectual contributions to political science, as it displays profound wisdom of a subject upon which discussion and debate centered for over a century and a quarter.

On February 13, 1836, Mr. Underwood, of Kentucky, presented an amendment to the Constitution of the United States under the terms of which the Secretary of the Treasury and other financial officers of the United States would be appointed by Congress.[49] Two years later, January 2, 1838, Mr. Underwood again pressed his amendment, but nothing came of his efforts.[50]

In December, 1841, Henry Clay introduced an amendment providing for the appointment and removal by Congress of the Secretary of the Treasury and of the Treasurer of the United States.[51] It was evident, however, that he had no idea of having his amendment taken seriously and that so far as he was individually concerned the text of it was contrary to his own ideas and submitted against his wishes, but it was offered simply out of duty

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[48] Adams, Charles Francis. Appeal to the Whigs (Boston, 1835), pp. 26–27.

[49] House Journal, 1835–1836, pp. 345–346.

[50] House Journal, 1837–1838, pp. 189–192, 483.

[51] Senate Journal, 1841–1842, p. 58.

and sympathy for the party to which he belonged.[52] The consideration of this amendment never extended beyond a second reading and Mr. Clay made no effort to have it go any further, as he appeared to avoid it rather than support it.

On March 21, 1842, Mr. Underwood presented for a third time an amendment to make the Secretary of the Treasury independent of the President.[53] An important secondary feature of this resolution was a provision that the appointment to all offices, except those provided for in the Constitution, and the removal therefrom should be regulated by Congress.

The bitter controversies that arose out of the Whig opposition to both President Jackson and President Tyler were responsible for these proposed amendments. With the approach of the Civil War the question of secession overshadowed all lesser issues, so it was not until 1863 that the question of limiting the President's removal power was revived.

On January 26, 1863, Senator Sherman brought in a bill (No. 486) to provide for a national currency, and during the early part of February this bill was debated in the Senate. According to section 1 of the proposed bill there was to be established within the Treasury a Bureau of

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[52] Mr. Clay explained that his object was merely to have the resolutions read the first and second time and then have them printed. He said that his motive of action was the curtailment of executive power; that the party to which he belonged came into power pledged to carry out that principle; and whether they were prepared to carry it out or not, so far as he was individually concerned, he intended to redeem that pledge as far as practicable. He further said that the resolutions were simply propositions, which he did not believe required commitment; and unless some Senator wished them committed he would move that they be made the order of the day for the 12th of January and be printed for the use of the Senate. (Congressional Globe, Vol. XI, 27th Cong., 2d sess., p. 69.) No speech by Mr. Clay was ever made in support of this amendment.

[53] House Resolution No. 7 (27th Cong., 2d sess.).

Currency, the chief officer of which was to be termed the Comptroller of the Currency. This comptroller was to be appointed by the President, by and with the advice and consent of the Senate, and to hold office "for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate." [54]

By the terms of this bill, therefore, the Senate was given an effective check upon the removal power of the President, but strange to say this feature was hardly adverted to in the debates upon the measure. The larger question of a stable currency occupied most of the attention of the Senate.[55] On February 12 the bill was finally passed by the Senate, and on February 25 it became law.

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[54] Ch. LVIII, Sec. I: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there shall be established in the Treasury Department a separate bureau, which shall be charged with the execution of this and all other laws that may be passed by Congress respecting the issue and regulation of a National Currency secured by United States bonds. The Chief Officer of said bureau shall be denominated the Comptroller of the Currency, and shall be under the general direction of the Secretary of the Treasury. He shall be appointed by the President, on the nomination of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, by and with the advice and consent of the Senate; . . . Approved February 25, 1863. (United States Statutes at Large, vol. 12, pp. 665–666.)

[55] Congressional Globe (37th Cong., 3d sess., pts. 1 and 2, pp. 505, 666, 703, 869, 896, 1237).

Chapter IV

THE APPOINTING POWER SINCE THE CIVIL WAR

Shortly after the passage of the currency bill February 12, 1863, Senator Davis, of Kentucky, became convinced of the efficiency of a senatorial check upon all Presidential removals from office in the appointment to which the Senate had a voice. According to the language of his proposed amendment to the Constitution:

> The President . . . may for a good and sufficient cause remove all those officers in whose nomination the *advice and consent of the Senate* is requisite, the motion from office shall continue only until the end of the next session of the Senate, unless it shall have approved such removal. The President shall, at the commencement of each session of Congress, communicate to each House the names of all persons he may have removed from office with the grounds therefor.[1]

Four years later, in 1867, some features of this proposed amendment were embodied in the famous tenure of office act.[2]

This act was the result of the break between President Johnson and Congress, and was passed over the President's veto by both Houses of Congress on March 2, 1867. Ever since 1789 it had been the Executive practice to dispose of obnoxious officeholders by simple removal,[3]

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[1] Congressional Globe (37th Cong., 3d sess., vol. 33, pt. 2, p. 1501).

[2] See Appendix F for the wording of this act.

[3] That the removal power was an Executive prerogative will be noted by the exercise of this power by the first administrations under the Constitution. Mr. Grundy, in Gales and Seaton's Register of Debates in Congress (Vol. VI, p. 215), gives the following removals under Presidents Washington and Adams:

Removals by President Washington:

1. E. Cross, collector for the port of Newburyport.
2. Surveyor of the port of Plymouth.

the second step being merely the nomination of a successor whose induction to office was dependent upon the confirmation of the Senate. By the terms of the tenure of office act this traditional practice was distinctly repudiated, although the act does not clearly assert whether the power of removal under the Constitution resides in the President and the Senate or in the Congress itself. Thereafter there were to be no more removals from office during a recess of the Senate, although in case of incapacity or legal disqualification the incumbent might be suspended by the President. The cause of this suspension must, however, be promptly reported to the Senate within 20 days after the opening of the next session, and in case that body refused to concur in the suspension the officer should at once resume his former official duties.[4]

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3. Mr. Carmichael, foreign minister, recalled.
4. Collector of Yorktown.
5. Collector of Maryland.
6. Collector of New Jersey.
7. Collector of South Carolina.
8. Inspector of revenue in New Jersey.
9. Inspector of revenue in South Carolina.
10. Mr. Pinckney, foreign minister, recalled.

Removals by President Adams:

1. Collector of New York.
2. Collector of Charleston.
3. Consul at Bordeaux.
4. Supervisor of revenue in New Hampshire.
5. Inspector of revenue in Virginia.
6. Surveyor in Virginia.
7. Collector of Perth Amboy, N. J.
8. Inspector at Perth Amboy, N. J.
9. Mr. Pickering, Secretary of State.

The removals made by President Jefferson totaled 39, which includes various kinds of offices.

For a complete report of removals by the several Presidents, see Fish, C. R. The Civil Service and the Patronage.

[4] McPherson, Edward. Political History of the United States during the Period of Reconstruction, Washington, 1871, p. 176.

On August 12, 1867, President Johnson, in disregard of the terms of the tenure of office act, suspended Edwin Stanton, Secretary of War, and immediately appointed Grant ad interim to the post on what he claimed "to be an explicit agreement that Grant should hold the post and compel Stanton to resort to the courts if he wished reinstatement."[5] Four months later, December 12, President Johnson communicated his reasons for removing Stanton to the Senate,[6] which body refused to concur with the President in his right to remove the Secretary of War, whereupon Stanton immediately went into possession of his office in Grant's absence. The President, realizing his defeat in his attempt to keep Stanton out of office, took steps to remove him by sending to the Senate the name of Thomas Ewing, of Ohio, as his successor, meantime appointing Adjt. Gen. Lorenzo Thomas to take charge ad interim, but Stanton still refused to relinquish the office.[7] This action on the part of the President so embittered the Senate that it led directly to impeachment proceedings against him and on the 21st day of February, 1868, a resolution was passed to the effect "that under

[5] Hamilton, Peter J. The Reconstruction Period—History of North America, Vol. XVI, pp. 193–194.

[6] McPherson, Edward. Political History of the United States during the Period of Reconstruction, Washington, 1871, p. 262.

[7] Stanton claimed that the reason he would not relinquish his post was not because of his desire for office nor the salary connected with the office, but only for public considerations of a high character, and in a letter to Congress he said that he held on in order to secure the proper execution of the reconstruction laws. Distasteful as it was to be out of harmony with his colleagues, he declared that the so-called Cabinet was not to his mind analogous to the English Ministry, and did not need to act in unison or be in harmony with the President. To Stanton, as to some other of the Republican leaders, the heads of the departments represented the people rather than the Chief Executive. (Hamilton, Peter J. The Reconstruction Period—History of North America, Vol. XVI, pp. 199–200.) Senator Charles Sumner, of Massachusetts, said the pivot of the impeachment was the removal of Stanton.

the Constitution and laws of the United States the President has no power to remove the Secretary of War and designate any other person to perform the duties of that office ad interim."[8] Copies of this resolution were at once served on both the President and Stanton. Appropriate committees were then appointed to notify the Senate and to draw up articles of impeachment, and on March 2 the following were reported:

Article I alleged at some length—

that the said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord, 1868, at Washington, in the District of Columbia, unmindful of the high duties of his office, of his oath of office, and of the requirements of the Constitution that he should take care that the laws be faithfully executed, did unlawfully, and in violation of the Constitution and laws of the United States, issue an order in writing for the removal of Edwin M. Stanton from the Office of Secretary of the Department of War.

Article II alleged—

that on the 21st day of February, in the year of our Lord one thousand eight hundred and sixty-eight, at Washington, in the District of Columbia, said Andrew Johnson, President of the United States, unmindful of the high duties of his office, of his oath of office, and in violation of the Constitution of the United States, and contrary to the provisions of an Act entitled "An Act regulating the tenure of certain civil offices," passed March 2d, eighteen hundred and sixty-seven, without the advice and consent of the Senate of the United States, said Senate then and there being in session, and without authority of law, did and with intent to violate the Constitution of the United States, and the Act aforesaid, issue and deliver to one Lorenzo Thomas a letter of authority in substance as follows, that is to say:

EXECUTIVE MANSION,
Washington, D. C., February 21, 1868.

SIR: The Hon. Edwin M. Stanton having been this day removed from office as Secretary for the Department of War, you are hereby authorized and empowered to act as Secretary of War ad interim,

[8] Hamilton, Peter J. The Reconstruction Period—History of North America, Vol. XVI, p. 196.

and will immediately enter upon the discharge of the duties pertaining to that office.

Mr. Stanton has been instructed to transfer to you all the records, books, and other public property now in his custody and charge.

Respectfully yours,

ANDREW JOHNSON.

To Brevet Major General LORENZO THOMAS,
Adjutant General, U. S. Army, Washington, D. C.

Then and there being no vacancy in said office of Secretary for the Department of War, whereby said Andrew Johnson, President of the United States, did then and there commit and was guilty of a high misdemeanor in office.

Article III alleged—

that said Andrew Johnson, President of the United States, on the 21st day of February, in the year of our Lord, 1868, at Washington, in the District of Columbia, did commit and was guilty of a high misdemeanor in office, in this, that without authority of law, while the Senate of the United States was then and there in session, he did appoint one Lorenzo Thomas to be Secretary for the Department of War ad interim, without the advice and consent of the Senate, and with intent to violate the Constitution of the United States, no vacancy having happened in said office of Secretary for the Department of War during the recess of the Senate, and no vacancy existing in said office at the time, and which said appointment so made by said Andrew Johnson of said Lorenzo Thomas, is . . . (as given in the second article).

Article XI—

that said Andrew Johnson, President of the United States, unmindful of the high duties of his office, and of his oath of office, and in disregard of the Constitution and Laws of the United States, did, heretofore, to-wit, on the 18th day of August, A. D., 1866, at the City of Washington, and the District of Columbia, by public speech, declare and affirm, in substance, that the Thirty-Ninth Congress of the United States was not a Congress of the United States authorized by the Constitution to exercise legislative power under the same, but, on the contrary, was a Congress of only part of the States, thereby denying, and intending to deny, that the legislation of said Congress was valid or obligatory upon him, the said Andrew Johnson, except in so far as he saw fit to approve the same, and also thereby denying, and intending to deny, the power of the said Thirty-Ninth Congress to propose amendments to the Constitution of the United States; and, in pursuance of said declaration, the said Andrew Johnson, Presi-

dent of the United States, afterwards, to-wit, on the 21st day of February, A. D., 1868, at the City of Washington, in the District of Columbia, did, unlawfully, and in disregard of the requirements of the Constitution, that he should take care that the laws be faithfully executed, attempt to prevent the execution of an Act entitled "An Act Regulating the Tenure of Certain Civil Officers," passed March 2d, 1867, by unlawfully devising and contriving, and attempting to devise and contrive means by which he should prevent Edwin M. Stanton from forthwith resuming the functions of the Office of Secretary for the Department of War, notwithstanding the refusal of the Senate to concur in the suspension theretofore made by said Andrew Johnson of said Edwin M. Stanton from said office of Secretary for the Department of War; and, also, by further unlawfully devising and contriving, and attempting to devise and contrive, means, then and there, to prevent the execution of an Act entitled "An Act Making Appropriations for the Support of the Army for the Fiscal Year ending June 30, 1868, and for other purposes," approved March 2d, 1867; and, also, to prevent the execution of an Act entitled "An Act to Provide for the more efficient Government of the rebel states," passed March 2d, 1867, whereby the said Andrew Johnson, President of the United States, did then, to-wit, on the 21st day of February, A. D., 1868, at the City of Washington, commit, and was guilty of, a high misdemeanor in office.[9]

Mr. Butler, in opening for the prosecution advanced the theory that not only were the Senators sitting as a political body rather than a court of justice, but that they

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[9] Hamilton, Peter J. The Reconstruction Period—History of North America, Vol. XVI, pp. 196–199.

The articles referring to only the appointing and removal power are given.

January 7, 1867, Congressman James M. Ashley, of Ohio, introduced a resolution impeaching the President, wherein he charged President Johnson "with a usurpation of power and violation of law in that he has corruptly used the appointing power;" . . . which act, "in contemplation of the Constitution, are high crimes and misdemeanors," which was referred to the Judiciary Committee. (Ibid,, p. 191.) Meanwhile, however, the tenure of office bill had come into existence and it was foreseen that it would meet the hearty approval of the Senate. This act made specific exception to Cabinet officers.

Congress had already silenced an obnoxious Attorney General, and the President wished to get rid of the obnoxious War Secretary.

should follow their political convictions regardless of any testimony or evidence introduced. With him it was an instance of salus populi suprema lex:

> We define an impeachable high crime or misdemeanor to be one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest; and this may consist of a violation of the Constitution or law, of any official oath, or of duty, by an act committed or omitted; or, without violating a positive oath, by the abuse of discretionary powers from improper motives or for any improper purpose.

Mr. Butler contended that the removal of Mr. Stanton was in violation of the tenure of office act;[10] that the act was law, and that the President in violating the law committed a misdemeanor which subjected himself to impeachment.

> "By whom was Mr. Stanton appointed?" asked he. "By Mr. Lincoln. Whose presidential term was he holding under when the bullet of Booth became the proximate cause of this trial? Was not his appointment in full force at this hour? Had any act of President Johnson up to the twelfth day of August last vitiated or interfered with that appointment? Whose presidential term is Mr. Johnson now serving out? His own or Mr. Lincoln's? If his own, he is entitled to four years up to the anniversary of the murder, because each presidential term is four years by the Constitution. . . . If he

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[10] The tenure of office act involved in the impeachment reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is, and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided: *Provided,* That the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

is serving out the remainder of Mr. Lincoln's term, then his term of office expires on the 4th of March, 1869, if it does not before." [11]

Mr. Butler, therefore, raised four important issues:

1. Whether upon the vacancy of the presidential chair the successor is to serve for a term of four years or only for the unexpired term of his predecessor.

2. Whether or not the President has the power to remove a Cabinet officer at will and without the advice and consent of the Senate, or whether such removal can only be made by and with the advice and consent of the Senate, as provided by the tenure of office act.

3. Whether a President serving the unexpired term of his predecessor has the right to remove a Cabinet officer appointed by his predecessor.

4. Whether a Cabinet officer is to serve for the full term of four years from date of his appointment, or only during the term of service of the President appointing him.

During the course of the trial the question of presidential removal was thoroughly reviewed. The lawyers for the defense argued that the right of removal was vested in the President by the Constitution, and that the act of July 27, 1789, merely recognized that fact.[12] The Senators conducting the prosecution denied the validity of such a construction of the Constitution and asserted that the power of removal had been conferred only by the act of 1789 itself. If Congress had conferred such a power in 1789, it could limit it in 1867.[13] By the passage of the tenure of office act Congress had placed its own construction upon the question of congressional control over removals from office, and if any doubt was entertained as

[11] Other forceful and eloquent addresses were delivered by Mr. Boutwell for the prosecution and Messrs. Nelson, Evarts, Groesbeck, Bingham, and Judge Curtis for the defense; but Mr. Butler's contentions alone are here considered, as it well shows the stand relied upon by the managers of the case.

[12] Congressional Globe (40th Cong., 3d sess., pt. 5, Appendix).

[13] Ibid. (pt. 5, Appendix).

to its constitutionality that was for the Supreme Court alone to decide.[14]

On May 26 the last vote on the impeachment of President Johnson was taken and resulted in his acquittal by a vote of guilty 35, not guilty 19, only 1 vote short of conviction. This vote, of course, did not affect the validity of the tenure of office act, which continued on the statute books, and which was held by the lower courts of the United States to be constitutional.[15]

Two years later, in the administration of President Grant, the tenure of office act was materially modified.[16] By the act of April 5, 1869, it was provided that civil officers who had been appointed by and with the advice and consent of the Senate should hold office "unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent of the Senate, of a successor in his place, except as herein otherwise provided." This act also provided that the President might, "in his discretion," suspend civil officers appointed by and with the advice and consent of the Senate, but in each case of suspension the President

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[14] Dunning, Wm. A. Essays on the Civil War and Reconstruction, New York, 1904, pp. 289–291.

[15] United States *v.* Avery (Deady, p. 204).

[16] General Grant in his first message to Congress earnestly recommended the total repeal of the act, saying:

"It may be well to mention here the embarrassment possible to arise from leaving on the statute books the so-called 'tenure of office acts' and to earnestly recommend their total repeal. It could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President. The law is inconsistent with a faithful and efficient administration of the Government. What faith can an Executive put in officials forced upon him, and those, too, whom he has suspended for reason? How will such officials be likely to serve an administration which they know does not trust them?" (9 Messages and Papers of the Presidents, p. 3992.)

should, within 30 days after the commencement of each session of the Senate, nominate persons to fill vacancies in office which existed at the meeting of the Senate.[17]

According to these provisions the President, during a session of the Senate, could not remove any civil officer in whose appointment the Senate had shared without at the same time sending in the nomination of a successor. In other words, there could be no separate act of removal without the consent of the Senate.

In the matter of suspension of civil officers during a recess of the Senate, the law of April 5, 1869, was far more liberal than the tenure of office act of March 2, 1867. Under the tenure of office act the President was directed to report to the Senate, within 20 days after its meeting, the names of all officers who had been suspended during the recess of the Senate, together with the reasons for such action.[18] If the Senate refused to concur in the suspension then the suspended officer should resume his former official duties.

Under the act of April 5, 1869, if the Senate refused to concur in the suspension of a particular civil officer, the President should nominate another officer in his place.[19] This power was really equivalent to the power of removal, although the exact meaning of the word "suspension" was open to question. The Attorney General in dis-

[17] United States Statutes at Large, vol. 16, pp. 6–71.

[18] McPherson, Edward. Political History of the United States during the Period of Reconstruction. Washington, 1871, p. 176.

[19] This section of the amended act read:

"And it shall be the duty of the President within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, to nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the place of all offices suspended; and if the Senate, during such session, shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to said session of the Senate for said office."

cussing this point held that if the Senate adjourned before confirming a nomination in cases of suspension, the suspended officer became reinstated, but could again be suspended.[20]

In the winter of 1885–86 fresh trouble broke out between the Executive and the Senate with regard to presidential removals. Upon his accession to the Presidency, Cleveland had to deal with a tremendous onslaught of office seekers, as it was inevitable that many changes in offices necessarily would have to be made in order that unity in policy and discipline of the Democrats might be had and maintained. The Democratic Party coming into office after a lapse of 24 years, it naturally seemed assured that a house cleaning would be necessary, at least among the most important offices.

From the beginning of this Democratic administration in March, 1885, wholesale removals and appointments were made, so that up to the convening of the Senate in December of the same year 643 officeholders under the preceding administration were ousted and a like number of nominations made.[21] All these recess appointments were sent to the Senate within 30 days after the opening of the senatorial session, but during the three months following only 15 of such nominations were confirmed for appointment. This was due to the hostile Republican Senate Cleveland had to face, and instead of passing upon the nominations that body referred them to numerous committees, apparently for the purpose of delay.

One of these recess nominations was that to the office of the district attorneyship for the southern district of Alabama. This office became vacant July 17, 1885, by President Cleveland's removal from that office of George M. Duskin, and to which he immediately appointed John

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[20] Suspension of Officers—Vacancies—Nominations (1877). 15 Opinions, Attorney General, p. 375.

[21] The removals comprised postmasters, district attorneys, marshals, internal-revenue officers, consuls, etc.

D. Burnett.[22] By the time the Senate took up the matter of filling this vacancy, the tenure of office act did not apply, as the office itself expired by limitation on the 20th of December, 1885, and therefore no question could be raised as to the legality of the vacancy then existing, if there was a vacancy, and the only action on the part of the Senate was to either confirm or reject the nomination of the President.

However, the first action relative to the office was a call by the Judiciary Committee, December 26, 1885, to the Attorney General requesting the transmission of "all papers and information in the possession of that department" regarding the nomination and "the suspension and proposed removal from office" of the former incumbent.[23] The Attorney General partially complied with the request of the committee by the transmission of the papers bearing upon the nomination of the proposed appointee and his failure to accompany any papers relative to the removal of the former occupant was explained by the fact that he had "received no direction from the President in relation to their transmission."[24] This action on the part of the Attorney General angered certain Members of the Senate, with the result that a resolution was adopted January 25, 1886, directing the Attorney General to transmit copies of all documents and papers touching the conduct of the office in controversy since the 1st day of January, 1885, the date upon which Mr. Duskin assumed charge of the office. In answer to the specific direction of this resolution, the Attorney General stated that he had forwarded all the necessary papers relating to the nomination, but with regards to those papers bearing upon the suspension of Mr. Duskin he was directed

[22] State papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 60.

[23] Ford, Henry Jones. The Cleveland Era, Chronicles of North America, vol. 44, p. 63.

[24] Ibid., p. 63.

by the President to say "that it was not considered that the public interest will be promoted by a compliance." [25] The position taken by both the President and the Attorney General, and also the Judiciary Committee, raised the "important question whether it is within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States, created by laws enacted by themselves." [26]

The Judiciary Committee in their report on the question asserted that the Senate possessed such a right and accordingly recommended a resolution to the Senate for adoption wherein the Attorney General was censured and it further declared it to be the duty of the Senate "to refuse its advice and consent to proposed removals of officers" when papers relating to them "are withheld by the Executive or any head of a department." [27] The resolution further maintained that when the orders of the President and the Senate conflicted, it was the duty of the Attorney General to obey the Senate. This issue was met and answered by the President in his message to Congress, March 1, 1886, wherein he stated that "ever since the beginning of the present session of the Senate the different heads of the departments attached to the executive branch of the Government have been plied with various requests and demands from committees of the Senate, from members of such committees, and at last from the Senate itself, requiring the transmission of reasons for the suspension of certain officials during the recess of that body, or for papers touching the conduct

[25] Ford, Henry Jones. The Cleveland Era. Chronicles of North America, vol. 44, p. 63.

[26] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 60.

Parker, George F. The Writings and Speeches of Grover Cleveland (1892), p. 466.

[27] Ford, Henry Jones. The Cleveland Era. Chronicles of North America, vol. 44, p. 64.

of such officials. . . ." [28] The President further observed that "though these suspensions are my executive acts,[29] based upon considerations addressed to me alone and for which I am wholly responsible, I have no invitation from the Senate to state the position which I have felt constrained to assume . . ." [30] and that "the letter of the Attorney General in response to the resolutions of the Senate . . . was written at my suggestion and by my direction. . . ." [31]

The contentions of President Cleveland were that he did not suppose "that the public offices of the United States are regulated or controlled in their relations to either House of Congress by the fact that they were 'created by laws enacted by themselves.' It must be that these instrumentalities were enacted for the benefit of the people and to answer the general purpose of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation." [32] The President further-

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[28] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 59.

[29] Mr. Cleveland in his The Independence of the Executive, written several years after his presidency, in explanation of the great number of suspensions made by him during his administration, said: "I have no disposition to evade the fact that suspensions of officials holding presidential commissions began promptly and were quite vigorously continued; but I confidently claim that every suspension made was with honest intent and, I believe, in accordance with the requirements of good administration and consistent with prior Executive pledges. By far the greater number of suspensions, however, were made on account of gross and indecent partisan conduct on the part of the incumbents." The Independence of the Executive, pp. 42–43, Princeton University Press, 1913.

[30] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 59.

[31] Ibid., p. 61.

[32] Ibid., p. 60.

more asserted that no official papers on file in the departments had been withheld and that "while it is by no means conceded that the Senate has the right in any case to review the act of the Executive in removing or suspending a public officer, upon official documents or otherwise, it is considered that documents and papers of that nature should, because they are official, be freely transmitted to the Senate upon its demand, trusting the use of the same, for proper and legitimate purposes, to the good faith of that body, and though no such paper or document has been especially demanded in any of the numerous requests and demands made upon the departments, yet as often as they were found in the public offices they have been furnished in answer to such applications." [33]

It would appear from the foregoing that President Cleveland would not have refused the transmission of any specific paper desired by the Senate or its committees, but that he did object to a call for all papers in a given case for the purpose of review to ascertain the facts, circumstances, and sources of information which prompted him to suspend and remove an incumbent. With reference to the papers in the present case, he stated that "they consist of letters and representations addressed to the Executive or intended for his inspection; they are voluntarily written and presented by private citizens who are not in the least instigated thereto by any official invitation or at all subject to official control. While some of them are entitled to executive consideration, many of them are so irrelevant or in the light of other facts so worthless that they have not been given the least weight in determining the question to which they are supposed to relate." [34]

The President also maintained that much of the correspondence coming to him is of a personal nature and

[33] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, pp. 60–61.

[34] Ibid., p. 62.

not to be considered as belonging to the public files and he did not hesitate to assert this conception, for he said: "I consider them in no proper sense as upon the files of the department but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain." [35] Furthermore, many representations and communications are often made to the Executive orally and which necessarily are not of record, and which are, at times, more relevant to immediate action than those communications which are written. This Cleveland himself observed: "It will not be denied, I suppose, that the President may suspend a public officer in the entire absence of any papers or documents to aid his official judgment and discretion; and I am quite prepared to avow that the cases are not few in which suspensions from office have depended more upon oral representations made to me by citizens of known good repute and by Members of the House of Representatives and Senators of the United States than upon any letters and documents presented for my examination." [36] These representations were not confined to his own party, for he stated: "I recall a few suspensions which bear the approval of individual members identified politically with the majority in the Senate." [37]

The President's message then reviewed the legislative history of the tenure of office act, and in questioning its constitutionality, said:

> The requests and demands which by the score have for nearly three months been presented to the different departments of the Government, whatever may be their form, have but one complexion.

[35] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 61.

[36] Ibid., p. 62.

[37] Ibid., p. 62.

They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not relinquish them, and my duty to the Chief Magistracy which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands.[38]

The logical stand taken by President Cleveland in meeting squarely every issue raised by the Senate mitigated in no small degree the hostility heretofore shown by several of the Republican leaders in the Senate, and when the resolution declaring it to be the duty of the Senate in all such cases "to refuse its advice and consent to proposed removals of officers" came up for vote, it was passed by only one vote majority; and two Republican Senators voted with the Democrats.[39]

Although President Cleveland decisively repelled the Senate's attempted invasion of the power of removal belonging to his office, claiming that the suspensions were purely executive acts over which the Senate exercised no supervision, he was still left in a deplorable state of servitude through the operation of old laws based upon the principle of rotation in office.

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[38] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 65. That the tenure of office act was unconstitutional and in no way restricted the Executive's removal power was always President Cleveland's belief, as he later said: "So far as removals following suspensions are concerned, the language of the law of 1869 certainly seems to justify the understanding that in this particular it virtually repealed the existing statute." The Independence of the Executive, p. 34. Princeton University Press, 1913.

[39] NOTE.—The result of the vote was a decided defeat for the Republican leaders in the Senate and they wisely decided to withdraw from any further attempt to question the President's prerogative in removing at will officials not coming directly under the provision of the tenure of office act. This was further evidenced by the confirmation of the nominee over which the contest arose. The resolution censuring the Attorney General came up for vote March 26, and was adopted by 32 ayes against 26 nays.

The acts of 1820 [40] and 1836 limiting commissions to the term of four years forced him to make numerous appointments which provoked controversy and made large demands upon his time and thought. His freedom of action was further curtailed by the act of 1863 prohibiting the payment of a salary to any person appointed to fill a vacancy existing while the Senate was in session until the appointment had been confirmed by the Senate.

Cleveland's civil-service reform policy was first noted November 27, 1885, when he approved rules confirming and extending the civil-service regulations. Charges had been made and filed against Collector Hedden, of the New York customhouse, to the effect that he was making a party machine out of his office. These charges prompted the Civil Service Commission to make an investigation of that office, and as soon as the investigation had been instituted Hedden resigned his office. President Cleveland immediately appointed Daniel Magone, of New York, to enforce the civil service law in the customshouse there. This constituted his first active movement in the reformation of the civil service law. Previous to this appointment, however, Cleveland issued an order, July 14, 1886, to all heads of departments warning all officeholders against the use of their positions to control

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[40] May 15, 1820. An act to limit the term of office of certain officers therein named, and for other purposes.

"*Be it enacted by the Senate* . . . That from and after the passing of this Act, all District Attorneys, Collectors of the Customs, Naval Officers and Surveyors of the Customs, Navy Agents, Receivers of public moneys for lands, Registers of the Land Office, Paymasters in the Army, the Apothecary General, and the Commissary General of Purchases, to be appointed under the laws of the United States, shall be appointed for a term of four years, but shall be removable from office at pleasure." (U. S. Stat. L., 13th to 17th Cong., 1813–1823, vol. 3, p. 582.)

NOTE.—During the first year of his administration, Cleveland sent approximately 2,000 nominations to the Senate. (Ford, Henry Jones. The Cleveland Era. Chronicles of North America, vol. 44, p. 108.)

political movements in their localities.[41] He further declared that "officeholders are agents of the people, not their masters. . . . They have no right, as officeholders, to dictate the political action of their associates, or to throttle freedom of action within party lines by methods and practices which prevent every useful and justifiable purpose of party organization."[42] The devotion to civil-service reform on the part of the President created strong hostility toward him by many Democrats in Congress, and Chairman Randall, of the Committee on Appropriations, threatened to cut all the appropriation for office room for the commission. Attempts were also made to repeal the civil service law.

Congress likewise showed its hostility toward the President in its prolonged delay in confirming Mr. Lamar, an eminent politician, as Associate Justice of the Supreme Court, and it was only after Cleveland had made a personal appeal to several Members of the Senate that the appointment was finally confirmed, January 16, 1888.

Considerable opposition was also manifested in the President's nomination of Melville W. Fuller, of Illinois, as Chief Justice of the Supreme Court, but due to a split in the Republican ranks the nomination was confirmed "by a substantial majority."[43]

Another of President Cleveland's nominations causing much agitation was that of James C. Matthews, of New York, to be recorder of deeds in the District of Columbia, filling the vacancy caused by the resignation of Frederick Douglass. Both of these incumbents were of the colored race, and which in itself constituted the sole objection to the nomination of Matthews. Following the Senate's re-

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[41] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 157.

[42] Ibid., p. 157.

[43] Ford, Henry Jones. The Cleveland Era. Chronicles of North America, vol. 44, p. 144.

jection of the nomination, President Cleveland on December 21, 1886, renominated him and pointed out that Matthews had actually occupied the office now for a period of four months, during which time he displayed great ability in managing the affairs of that office, and which now ought to remove "much of the opposition to his appointment which has heretofore existed."[44] Cleveland, in urging the confirmation, also confessed "a desire to cooperate in tendering to our colored fellow citizens just recognition . . ."[45] The nomination was later confirmed.

The hostility of the Republican Senators toward Cleveland and his administration was of much annoyance to him while he was at the head of the Nation and also during the balance of his life, as several years after his retirement from politics he offered a paper on the Independence of the Executive, which, if not a vindication, constituted an explanation as to his persistent stand in maintaining his independence as Chief Executive during his first administration.

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[44] State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 217.

[45] Ibid., p. 217. (See also Cleveland, Grover. Atlantic Monthly, vol. 86, p. 1.)

NOTE.—President Cleveland again struggled with Congress in his several pension vetoes, which provided pensions for soldiers and their dependents who bore arms in defense of the Union, but Congress took no heed of the President's action, with the result that hundreds of pension claims, many of which were unwarranted, were allowed by Congress, in disregard to the President's instructions that they should be presented for examination to the Pension Bureau. (See President Cleveland's First Annual Message to Congress, December, 1885, in which reasons are given for his vetoing pension claims.) (See also State Papers of Grover Cleveland. Government Printing Office, Washington, 1889, p. 51.)

During the period of 96 years from the foundation of the Government down to the beginning of Cleveland's administration the entire number of veto messages was 132. In four years Cleveland sent in 301 veto messages, and in addition, he practically vetoed 109 bills by inaction.

It was naturally conceded and expected that the Democratic Party, coming into power after a lapse of a quarter of a century, would make many sweeping changes in offices and their incumbents in order that sufficient sympathy and support might be given the Executive and his policies, and consequently to harmonize to considerable extent the functions of the three branches of the Government. One means by which this end could be accomplished was to replace Republican officers with men of his own party and another by the process of the veto, disapproving certain bills and measures proposed by a Republican Congress, and this Cleveland did. He would grant no concessions to a hostile Congress, even though severely criticized by that body and after many of his nominations were rejected.

Cleveland always maintained that the executive department was separate and distinct from the other departments of the Government and that the functions of each were independent.[46] This was his administration and

[46] NOTE.—President Cleveland, in March, 1886, in discussing the requests which the Senate had made for his reasons in removing officials and the assumption the Senate had the right to pass upon those removals and thus to limit the power of the President, said:

"I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that 'the executive power shall be vested in a President of the United States of America,' and that 'he shall take care that the laws be faithfully executed.'

"The Senate belongs to the legislative branch of the Government. When the Constitution by express provision superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general senatorial duties, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with executive functions." (11 Messages and Papers of the Presidents, 4964.)

that he was serving the people whom he represented and not Congress was often asserted by him, both during and long after his administration. Thus, he said: "When, however, I now speak of the Presidency as being preeminently the peoples' office, I mean that it is especially the office related to the people as individuals, in no general, local, or other combination, but standing on the firm footing of manhood and American citizenship." [47]

If Congress was to continue its hostility toward the Executive, the President could retard and embarass that body by disapproving many measures presented to him. Many mandates of Congress, especially those the purpose or objective of which was adverse to Cleveland's ideas and his policies, were repeatedly ignored, and this stand was he to continue until the Congress realized the independence of the Executive. That Congress should rid itself of the hostility toward him and work in harmony with the executive department, he hoped for. "The Congress," he said, "may enact laws; but they are inert and vain without executive impulse." [48] This clearly shows that Cleveland thought the executive branch independent and that Congress should follow out his policies and that he would lend no support to the Legislature unless that body had sufficient sympathy with the Executive and his administration by yielding to the policies he adopted. The legislation of Congress was in vain without the impulse of the Executive, and as Cleveland was to make no concessions, Congress must, and moreover, as Cleveland believed, the acts of the President were the will of the people and not of Congress, the legislative branch should cooperate with him in the conduct of the country's affairs, which he himself was intrusted to direct.

[47] The Independence of the Executive, pp. 9–10. Princeton University Press, 1913.

[48] Ibid., p. 10.

As a representative of the people, Cleveland owed his allegiance to those who supported him to the presidency and it was they whom he was to satisfy and not the Congress. That he owed his supporters the fulfillment of many pledges was apparent by his numerous suspensions and removals the first few months of his administration and by his later remarks in defense of his many appointments: "While I claim to have earned a position which entitled me to resent the accusation that I either openly or covertly favor swift official decapitation for partisan purposes, I have no sympathy with the intolerant people who, without the least appreciation of the meaning of party work and service, superciliously affect to despise all those who apply for office as they would those guilty of a flagrant misdemeanor." [49]

Thus it will be seen that the people of his party were foremost in his mind, and to them he owed allegiance, and to them he looked for approval of his administration and of his persistent independence as President.

Finally, on March 3, 1887, Congress passed an act repealing the act of 1869,[50] which in turn had amended the tenure of office act of 1867. The result is that Congress has reverted to the earlier construction of the right of presidential removal which obtained from 1789 to 1867.[51]

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[49] The Independence of the Executive, p. 40. Princeton University Press, 1913.

[50] The repealing act passed the Senate by 30 affirmative votes against 22 in the negative, and in the House of Representatives by a majority of 105.

[51] The repealed act was always held to be unconstitutional by President Cleveland, and he disregarded its tenure in replacing officers, and his approval of the acts of Congress in repealing the act are best noted when he later stated:

"Thus was an unpleasant controversy happily followed by an expurgation of the last pretense of statutory sanction to an encroachment upon constitutional executive prerogatives and thus was a time-honored interpretation of the Constitution restored to us. The President, freed from the Senate's claim of tutelage, became again the independent agent of the people, representing a coordinate branch

The tenure of office act and the amending act of 1869 only recently came before the Supreme Court for interpretation and their constitutionality tested,[52] although certain phases of them were before it from time to time.

The latest occasion upon which the President's removal power was discussed in Congress was during the last days of President Wilson's administration.

On June 4, 1920, President Wilson returned the budget and accounting bill to Congress with his veto. He disapproved of section 303 of the bill, which provided, in part, that the Comptroller General and the Assistant Comptroller General "may be removed at any time by concurrent resolution of Congress, after notice and hearing, when, in their judgment, the Comptroller General or Assistant Comptroller General is incapacitated or inefficient or has been guilty of neglect of duty or of malfeasance in office or of felony or conduct involving moral turpitude, and for no other cause and in no other manner, except by impeachment."

The President based his disapproval on the grounds, first, that the power of appointment of officers of the United States carried with it as an incident the power to remove, and that Congress was without constitutional power to limit the appointing power and its incidental power of removal derived from the Constitution; and, second, that Congress has no constitutional power to remove an officer of the United States from office by a concurrent resolution.[53]

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of their Government, charged with responsibilities which, under his oath, he ought not to avoid or divide with others, and invested with powers not to be surrendered but to be used under the guidance of patriotic intention and an unclouded conscience." (The Independence of the Executive, pp. 81–82. Princeton University Press, 1913.)

[52] Myers *v.* United States (47 S. C. 21, 1926).

[53] In his message withholding his approval of the act, which he thought infringed upon the executive power of removal, President Wilson said:

"It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries

As previously stated the constitutional provision relating to the appointing power of the President is—

> And he shall nominate and, by and with the advice and consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law; but Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the Courts of law, or in the heads of departments.[54]

As to what the term "officers of the United States" constitutes, the Supreme Court has rendered the following definition:

> The Constitution, for purposes of appointment, very clearly divides all of its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices become numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law invest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.[55]

This doctrine was confirmed in a later case, and Mr. Justice Miller in delivering the opinion of the court said:

> What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in United States *v.* Germaine. In that case it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the

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with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointment power and its incident, the power of removal, derived from the Constitution." (50 Congressional Record, June 4, 1920, p. 8609.)

[54] United States Constitution (Art. II, sec. 2, clause 2).

[55] United States *v.* Germaine (99 U. S. 509–510).

head of a department; and the heads of the departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.[56]

There is no doubt that the Comptroller General provided for in the Budget bill is an officer of the United States within the intention of the Constitution. But to which class does he belong? Does he belong to the primary class which requires that he be appointed by the President, by and with the advice and consent of the Senate, coming under the category of "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law," or is he one of the inferior officers of the United States whose appointment Congress may by law vest "in the President alone, in the courts of law, or in the heads of departments"?

The Constitution does not specifically define the term "inferior officers," nor has the Supreme Court formulated a definition. The nearest approach to a definition is in the Germaine case, cited above, in which the court said that inferior officers of the United States were those officers inferior to those specially mentioned in the Constitution as requiring nomination by the President and confirmation by the Senate.

A distinguished authority on constitutional law, in discussing this question, says:

> The point has never been squarely passed upon by the court, since Congress has never attempted to regulate the appointment to any but distinctively subordinate and inferior positions. Should it attempt to determine by law the appointment of heads of the great departments, or even of the heads of bureaus and divisions and commissions, or even of important local officers, such as revenue officers or postmasters in

[56] United States *v.* Monat (124 U. S. 307).

larger cities, the constitutionality of the law would undoubtedly be subjected to judicial examination.[57]

Now, the Comptroller General is designed to be a great officer of state, who is at the head of an independent establishment of the Government. He would hold office practically for life. The dignity, power, and influence of his office would perhaps be second to none of the appointed officers of the Government. In the ordinary meaning of the word it can not be said that he is "inferior" to consuls "and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law." In considering the Comptroller General as an "inferior" officer of the United States it is necessary to give a technical meaning to the word "inferior" as used in the Constitution.

Undoubtedly it was the intention of the House Select Committee on the Budget in drafting the bill that the Comptroller General should be classed as an "inferior" officer under the Constitution. This is made evident by the fact that when the bill was sent back with the President's veto the committee brought in an amendment vesting the appointment of the Comptroller General in the Supreme Court of the United States.[58]

In fact, the President's veto message assumed that the Comptroller General and his assistant would be regarded as inferior officers when he said:

> It would have been within the constitutional power of Congress in creating these offices to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department.

In view of the fact that there are so few decisions in the Supreme Court on the question of appointments and removals, and none directly defining the respective powers of the President and Congress, the fact may be empha-

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[57] Willoughby, W. W. The Constitutional Law of the United States, Vol. II, pp. 1175–1176.

[58] Congressional Record (66th Cong., 2d sess., p. 8647).

sized that Congress is in a stronger position with reference to the appointment and removal of inferior officers than with the officers of the primary class. Over the former they can control both the method and condition of appointment and removal as they may see fit. If the President is given power by Congress to appoint such an officer, he receives this grant of power with the conditions and limitations upon which it is made. He has not the same inherent and constitutional rights relative to these offices that he has to those specifically provided for in the primary class in the Constitution. However, the constitutionality of any law enacted by the Congress respecting the appointment and removal of officers, in so far as it affects the right and powers of the executive department, is the governing factor, and any attempt on the part of Congress to regulate such appointment to and removal from a particular office, to be valid, must not conflict with the constitutional provisions respecting the executive branch. This applies to officers of the primary and secondary classes.

The following extracts give a review of the opinions of the Supreme Court on the power of Congress to limit and condition the power of removal of an officer of the United States, in so far as this court has considered the subject:

> All offices the tenure of which is not fixed by the Constitution or limited by law must be held during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent, or must be held at the will and discretion of some department of the Government, and subject to removal at pleasure. . . . In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.[59]

The implication is clear that Congress has the power to limit or abolish the power of removal which inheres in the power to appoint. This case related to that of a

[59] Ex parte Hennen (13 Pet. 230, 259).

clerk of a district court of the United States who had been removed by the judge. He comes, without doubt, within the class of "inferior" officers.

Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President, by and with the advice and consent of the Senate, under the authority of the Constitution, does not arise in this case and need not be considered.

We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

The head of a department has no constitutional prerogative of appointment to offices independent of the legislation of Congress; and by such legislation he must be governed not only in making the appointments but in all that is incident thereto.[60]

Assuming that the Comptroller General is an "inferior" officer of the United States, as was assumed in the President's veto, does not the same argument applied in this case to heads of departments apply also to the President? The President has, by the rule laid down in this case, no constitutional prerogative of appointment to offices inferior to those in the primary class mentioned in the Constitution, independently of the legislation of Congress, and, therefore, so far as these offices are concerned, the Comptroller General clearly comes within this rule.

In the case of Parsons *v.* United States,[61] the facts were that the President had removed from office a district attorney before the expiration of the latter's 4-year term of office, and the Senate confirmed the new appointee. Parsons contended that this action was illegal. The court took the view that this would leave impeachment as the only remedy, and further said:

This could never have been the intention of Congress. On the contrary, we are satisfied that its intention in the repeal of the

[60] United States *v.* Perkins (116 U. S. 483).

[61] 167 U. S. 324.

tenure-of-office section of the Revised Statutes was again to concede to the President the power of removal if taken away from him by the original tenure of office act, and by reason of the repeal to thereby enable him to remove an officer when, in his discretion, he regards it for the public good, although the term of office may have been limited by the words of the statute creating the office. This purpose is accomplished by the construction we give to section 769, while the other construction turns a statute meant to enlarge the power of the President into one circumscribing and limiting it more than it was under the law which was repealed for the very purpose of enlarging it.

The implication is made by this decision that Congress had the power to limit the power of removal even as to those officers of the United States whose appointment must be confirmed by the Senate.

In Reagan *v.* United States[62] the court, in classifying United States commissioners appointed under act of Congress by the United States Court for Indian Territory as "inferior" officers, said:

The commissioners hold office neither for life nor for any specified time, and are within the rule which treats the power of removal as incident to the power of appointment, unless otherwise provided. . . . Where causes of removal are specified by the Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If they were not, the appointing power could remove at pleasure or for such causes as it deemed sufficient.

This rule that notice and hearing must be had before an officer can be removed for causes specified in the statute was confirmed in the case of Shurtleff *v.* United States,[63] in which were cited seven opinions of the State courts upholding this practice.

Shurtleff held the office of general appraiser of merchandise, and although the statute specified certain causes for which he might be removed from office he was, nevertheless, removed from office by the President without ref-

[62] 182 U. S. 419.
[63] 189 U. S. 311.

erence to those causes. The court, among other things, said:

> We assume, for the purposes of this case only, that Congress could attach such conditions to the removal of an officer appointed under this statute as it might seem proper; and, therefore, that it could provide that the officer should only be removed for the causes stated, and for no other, and after notice and an opportunity for a hearing. It can not now be doubted that, in the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate.

In referring to the opinion in the case of Blake *v.* United States,[64] in which, although there may have been some doubt, the power of the President to remove, under a certain act, was upheld, the court said:

> This indicates the tendency of the court to require explicit language to that effect before holding the power of the President to have been taken away by an act of Congress. . . .
>
> The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by the Constitution or statute. It requires plain language to take it away. . . .
>
> The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language. . . . A removal for any of those causes can only be made after notice and an opportunity to defend.

These cases established the doctrine that Congress had the constitutional power to limit and condition the power of removal of "inferior" officers of the United States, even in those cases where the appointing power has been vested by Congress in the President, and that the President acquires no greater authority to remove than do the courts of law or the heads of departments. If this were true, the power of removal would be derivative only, and the source of the grant Congress, and in Congress alone would there be the inherent constitutional right to create the office, to authorize the appointment, to condition the

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[64] 103 U. S. 227.

appointment, and to provide the manner of removal. Assuming that the Comptroller General and the Assistant Comptroller General are "inferior" officers of the United States, as no doubt Congress assumed and as the President assumed in his veto message, is it to be presumed the President's contention that Congress could not limit his incidental right of removal of those officers is not well taken?

The second phase of the President's veto raises the question whether Congress itself could, by concurrent resolution, remove the Comptroller General and the Assistant Comptroller General from office. It would seem that there is nothing in the Constitution nor in the decisions of the Supreme Court to imply that Congress did not have this power as to "inferior" officers. The Supreme Court has fairly decided that Congress is in complete control of the conditions and methods of removal, and there seems to be no reason why removal could not be made by Congress itself. The Constitution itself is silent on the question of removal. It does provide that each House of Congress may appoint and remove its own officers, but no provision is made for a joint officer or officers of Congress.

The question has been raised as to the effectiveness of this method of removal. It has been contended that a concurrent resolution of this character would have to be submitted to the President for his approval and be subject to his veto. The Constitution states:

> Every order or resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on the question of adjournment) shall be presented to the President of the United States, and before the same shall take effect shall be approved by him, or on being disapproved by him shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.[65]

[65] Constitution (Art. I, sec. 7, clause 3).

The Supreme Court has never had occasion to interpret this clause, but Congress itself has, as the data to follow shows, put its own interpretation upon it.

On February 20, 1896, the Senate directed its Committee on the Judiciary to report to the Senate "whether concurrent resolutions generally are required to be submitted to the President of the United States." On January 26 of the following year, Senator David B. Hill, of New York, presented an exhaustive and learned report, which is to-day the outstanding authoritative discussion on this problem.[66] His committee found that for over a hundred years it had been the settled practice of Congress not to present concurrent resolutions to the President. The report read:

> They have uniformly been regarded by all the departments of the Government as matters peculiarly within the province of Congress alone. They have never embraced legislative provisions proper, and hence have never been deemed to require Executive approval.
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> * * * * *
>
> This practical construction of the Constitution, thus acquiesced in for a century, must be deemed the true construction, with which no court will interfere. . . .
>
> It has been the uniform practice of Congress since the organization of the Government not to present concurrent resolutions to the President for his approval and to avoid incorporating in any such resolutions any matter of strict legislation requiring such presentation. As a matter of propriety and expediency it is believed to be wise to continue that course in the future.
>
> Whether concurrent resolutions are required to be submitted to the President must depend not upon their mere form but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do they must be presented for his approval; otherwise, they need not be. In other words, we hold the clause of the Constitution which declares that every order, resolution, or vote must be presented to the President, to "which the concurrence of the Senate and House of Representatives may be necessary," refers to the necessity occasioned by the requirements of the other provisions of the Constitution, whereby every exercise of "legislative powers" involves the concurrence of the two

[66] Senate Report 1335 (54th Cong., 2d sess.).

Houses; and every resolution not requiring such action, to wit, not involving the exercise of legislative powers, need not be presented to the President. In brief, the nature or substance of the resolution, and not its form, control the question of its disposition.

The committee took the point of view that the spirit rather than the letter of the Constitution should control. That certain actions could be taken by Congress in which the President had no concern and which did not involve a legislative act. The settled traditions of Congress, extending over a period from the foundation of the Government to the present time would seem to be a controlling factor in the interpretation in this clause of the Constitution.

Congress has, however, never attempted to remove an officer by concurrent resolution. This is a new departure. Does such a removal partake of a legislative character? In other words, would the concurrent resolution removing him be legislation and require the approval of the President? In that case the concurrent resolution would defeat its own purpose and the President by disapproving it might prevent the removal of the officer in question. Legislation implies either a new act of Congress or the amendment or repeal of an existing act or acts. The concurrent resolution of removal would not come within these categories. The Budget bill, as passed, with this provision, became basic law, requiring a certain method of removal, to wit, removal by concurrent resolution. When Congress, in conformity to the provisions of this act, passed the concurrent resolution of removal it would be simply complying with the administrative provisions of existing law. This would not be legislation at all and would come within the category of the traditional practice of Congress relative to concurrent resolutions.

The proper interpretation of this clause of the Budget bill involves a careful consideration of the necessities of the occasion. It is an admitted fact that the Government is now called upon to spend through its executive agen-

cies billions of dollars yearly out of the Public Treasury, necessitating the imposition of high and burdensome taxes upon the people as a whole. It is also an admitted fact that the machinery for the examination, audit, control, and report on these expenditures fails to give an adequate protection to the taxpayer. Congress is creating a new office—the General Accounting Office of the United States—to be under the direction of a Comptroller General who shall be absolutely independent of the Executive and at the same time occupy a very close and intimate relationship to Congress itself. The purpose of this action is to provide an official who will be able without fear of Executive control or Executive removal to go into the executive departments where the money is being spent and to investigate and report his finding to the Congress. Congress is responsible to the people under the Constitution for the appropriation of all money from the Treasury.

The President has no proper concern either in the appointment or in the removal of this officer. The fact that he is appointed by the President in the Budget bill is a concession to the constitutional necessities of the occasion. If Congress could constitutionally appoint such an officer he would be so appointed. But as to his removal it is absolutely vital that it should rest with Congress if this officer is to have any independence to report what he finds. Congress should have the initiative in the removal. The concurrent resolution preceded by notice and hearing before the appropriate committee as a method of removal appears to be justifiable both in fact and in law. If there are constitutional doubts they should be resolved in favor of Congress.

The framers of the Constitution were very zealous of the preservation of the legislative branch of the Government from encroachments by the Executive. They were careful to give Congress the fullest control over public finance. But they could not foresee these days of stupendous expenditures nor the modern methods necessary for

their proper control. And, although the letter of the Constitution appears adverse to the establishment by Congress of an independent audit, yet the spirit is in favor of it. The idea embodied in this section of the Budget bill is in harmony with the purposes and aims which the framers had in mind in drafting the financial clauses of the Constitution. They desired to protect the taxpayer from the irregular expenditures of public funds by the Executive. Looking beyond the form to the substance, the second phase of the President's veto rests also on an insecure foundation.

Rather than give the President the power to remove this officer it would be wiser to provide that he can be removed only by impeachment. This would put him in the same category as that of the judges. It would not, however, meet the needs of the occasion as would the removal by concurrent resolution. Civil officers can be impeached only for "treason, bribery, or other high crimes and misdemeanors."[67] They can not be removed from office by this method for incapacity, inefficiency, and such other minor matters as might unfit them for the practical affairs of a public office. Yet, on the whole, the service of this officer would be more effective if he could be removed only by impeachment than if he could be removed by the President. The President should not have the initiative in the removal of this officer even though stringent conditions were made in the act.[68]

President Wilson just before his retirement from office experienced great difficulty in securing the consent of the Senate to his nominations. These nominations numbered into the thousands, and among them were certain of his

[67] Constitution (Art. II, sec. 4).

[68] See Congressional Record (66th Cong., 3d sess., Vol. LX, pt. 1, pp. 339–341). When the bill finally became law, it provided that the Comptroller General was to be appointed by the President, with the consent of the Senate, for a term of 15 years, and to be removable only by joint resolution of Congress. (42 Stat. 23, 24.)

Cabinet officers whom he wished to have life jobs after the close of his administration.

Mr. Joseph P. Tumulty, President Wilson's secretary, was offered an appointment on the International Joint Commission, which carries an annual compensation of $7,500. This commission has jurisdiction over all cases involving the use or obstruction or diversion of waters forming the boundary or crossing the boundary between the United States and Canada, and any questions involving the rights, obligations, or interests of the two countries may be referred to it. The appointment to the office vested exclusively in the President and required no confirmation on the part of the Senate. However, Mr. Tumulty declined the appointment, whereupon it was offered to Mr. William B. Wilson, Secertary of Labor, who accepted it. Considerable dissatisfaction was manifested in the Congress over the appointment, which included a great number of Democrats. A great deal of the opposition to the appointment was because the President, in order to make room for his few loyal friends, removed Obadiah Gardner, a Democrat from Maine, who occupied the office. As soon as President Harding became the Chief Executive of this Nation protest was made to him by Senator Townsend, of Michigan, against the ousting by President Wilson of Mr. Gardner and the appointment of the Secretary of Labor. Following the protest, Senator Townsend urged President Harding to ask Mr. Wilson to resign from the commission, which undoubtedly was carried out, as Mr. Wilson's resignation shortly followed. At least, the President pointed out to the former Secretary of Labor that Mr. Gardner's absence from the commission was considered a serious handicap to its work and that he would welcome his (Mr. Wilson's) resignation in order to reappoint Mr. Gardner to the office.

The first formal acknowledgment that the Republican Senators had decided to prevent the confirmation of thousands of pending nominations for office sent in by Presi-

dent Wilson was made during the middle of January, 1921. The agreement among the Republicans provided that no executive session would be held before the end of the present Congress on March 4, 1921, the day Mr. Harding was to become President, which meant that no opportunity for moving the confirmation of any nomination would be presented.

At a conference of Republican Members of the Senate during the month of January, 1921, the disposition of more than 10,000 nominations sent to the Senate for confirmation by President Wilson was discussed, and it was decided to refer all the nominations to the proper committees, where the lists would be carefully gone over and such nominations as were found to be nonpolitical might be reported for confirmation. However, the general understanding among the Republican Senators was that very few of the nominations would be recommended for confirmation. These nominations included Army and Navy officers, postmasters, nominations to positions in the Patent Office, the Treasury Department, the Shipping Board, and the like. Only a few of the nominations were confirmed, and these only because of a shortage in certain of the departments where the work was being curtailed on account of vacancies.

President Harding shortly after taking the oath of office as President carried out his policy of economy by directing the dismissal of thousands of employees in the executive departments.

On the 31st of March, 1922, he removed 28 officials of the Bureau of Engraving and Printing, including the Director of the Bureau,[69] and simultaneously appointed

[69] The Executive order read, in part, as follows: "On and after this date the Director of the Bureau of Engraving and Printing, James L. Wilmeth, and the assistant director, James M. Fisher, are removed. Louis A. Hill is hereby appointed to be director and John P. Perry to be assistant director. This action is taken for the good of the service. . . ."

other officers to certain of the vacancies. No advanced notice of dismissal was served upon any of the discharged officers and many questions arose as to whether or not by making the removals he violated or disregarded the civil service law, and if not, then did the law in fact offer any protection to employees of the Government, or did the law deny the President any power to make any such removals, as the law provides that—

> No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing. . . . "[70]

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[70] 37 Stat. 555, sec. 6 (Aug. 24, 1912).
The following dismissals were made by the order:
The director.
Assistant director.
Custodian of dies, rolls, and plates.
Chief clerk.
Foreman of builders and cleaners.
Storekeeper.
Chief of examining division.
Chief of stamp book and coil division.
Chief engineer and machine division.
Chief surface division.
Chief stamp gum division.
Assistant chief surface division.
Superintendent of transferrers.
Superintendent of work.
Chief numbering division.
Chief wetting division.
Assistant chief wetting division.
Chief printing division.
Chief engraving division.
Chief stamp packing division.
Superintendent of electrolytic section.
Assistant chief engineer and machine division.
Mechanical expert and designer.

The removals were made "for the good of the service" in order that efficiency of the bureau might be promoted, and the President in thus stating his reason for the dismissals complied with the letter of the law.

The provision of the law that the person whose removal is sought "shall have notice of the same" raised the further question as to just what constitutes due notice, and was also the subject of much discussion. The law does not state that advanced notice must be given to the officer displaced, nor does the law provide any length of or reasonable time in which notice must be given to an officer or employee before the termination of his duties by dismissal. As soon as an appointee assumes the duties of an office or physically takes possession of it, this action in itself constitutes due notice to the officer removed that he has been displaced. However, the incoming officer necessarily should acquaint the officer displaced with the fact that he has a commission or letter of appointment signed by the President or head of one of the departments authorizing him to take over the office, and, in order that no question might arise as to the authority of the appointee in taking possession of the office and all books, documents, and papers of the displaced officer, the appointee should present his commission or letter of appointment to the officer so displaced for his reading and satisfaction that he has been removed. As soon as this has been done, the provision of the law as regards notice of dismissal being given the discharged officer has been fulfilled. The provision of the law that the discharged officer must "be furnished with a copy thereof" applies only to where "charges" have been preferred against the officer for misconduct in office of a criminal nature, such as cor-

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Chief stamp perforating division.

Superintendent photolithograph section.

Superintendent picture engravers.

NOTE.—Many of the above offices were abolished by the President's Executive order.

ruption, bribery, and the like, and in no way refers or applies to the notice itself where the dismissal was for the good of the service.

To allow a displaced officer a reasonable time in which to personally answer in writing the reasons for his removal only applies to where charges have been preferred against him and not to the notice. Where an officer has been removed for the good of the service, no answer is required under the law on the part of the displaced officer and none is desired by the removing authority. Where, however, there is some question as to the faithful performance of duty or specific charges are preferred against an officer for a violation of his trust, then he is allowed such reasonable time under the law in which to answer the allegations or charges before he is finally dismissed from the service if the removal authority desires to give the officer an opportunity to first explain or answer the charges. Unless the removal authority desires or requests such answer or explanation, the terms of the law do not compel the removing authority to first require an answer before dismissal, and where such request is desired or demanded a failure to answer as provided by the law, and within a reasonable time, will necessarily presume that the charges are well founded and true, and he then may be dealt with according to law in such cases provided. However, even though an answer to any charge is desired, and upon hearing the charges unsustained and the officer under surveillance vindicated, this does not necessarily infer that the office in the incumbent is secure, as he may be removed, nevertheless, for the good of the service. The law does not give the displaced officer a reasonable or any time in which to answer the reason for his removal when dismissed for the good of the service, as such reasonable time is only allowed him when requested by the removing authority to answer specific charges or allegations, as the law further states that " no examination of witnesses nor

any trial or hearing shall be required except in the discretion of the officer making the removal." [71]

Officers and employees in the service, whether civil or military, may be and are removed for nonfeasance, misfeasance, or malfeasance of the duties coming under their offices,[72] for malconduct while in office,[73] or for being indiscreet. All officers and employees of the Government are servants of the people, and while so serving are expected to perform the duties coming under their office in a faithful manner, and for any neglect in duty are subject to removal.[74] Should any officer or incumbent be found inefficient, incompetent, or incapacitated to perform the official duties of his office, he is likewise subject to removal.[75] So, too, when some particular work coming under any department of the Executive has been completed and the services of any of the officers or employees no longer required, they are subject to dismissal " for the good of the service." Where officers or clerks of one department are dismissed because the work of that department no longer requires their services, it is not a required duty of the head of such department or subordinate officer thereof to certify over to some other department such officers no longer required, even though another department's personnel is short and is employing additional help and could use the services of those dismissed by other departments, although the practice of certification from one department to another is frequently followed.

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[71] 37 Stat. 555, sec. 6 (Aug. 24, 1912).

[72] Shurtleff *v.* United States (189 U. S. 311).

[73] State *v.* Crump (134 Tenn. 121; 1916D L. R. A. 951). As to dismissals of officers in the Army see Articles of War, article 118; acts Apr. 10, 1806, ch. 20; art. 11, 2 Stat. 361, July 13, 1866, ch. 176, sec. 5, 14 Stat. 92; Aug. 29, 1916, ch. 418, sec. 3, 39 Stat. 669. For officers of the Navy see Articles for Government of the Navy, arts. 36, 37; acts Mar. 3, 1865, ch. 79, sec. 12, 13 Stat. 489; July 13, 1866, ch. 176, sec. 5, 14 Stat. 92.

[74] Shurtleff *v.* United States, supra.

[75] Ibid.

The Bureau of Engraving and Printing is a branch or bureau of the Treasury Department, with a director in charge. The director is appointed either by the President or by the Secretary of the Treasury, and such appointment requires no confirmation on the part of the Senate, it being an inferior office. All the business of this bureau is under the immediate control of its director, subject to the direction of the Secretary of the Treasury, and the director is to report to and be responsible to the Secretary of the Treasury.[76]

The removal power being incidental to the appointing power, the Chief Executive or the heads of the executive departments can remove any of the inferior officers or employees in their respective departments, whether they are under civil service or not, and such removals made for any reason whatsoever, and so long as they come under the general term " for the good of the service."

If, however, an officer in the executive department is appointed by Congress under some law providing for a specified term of years, or during good behavior during which the incumbent is to serve, or for life, the President and the heads of the departments are without power to remove him at will, and for any misconduct in office charges must be first preferred against the officer and sustained by impeachment proceedings before he can be removed. Under such tenure of office he can hold the office for the full and specified time for which appointed, so long as his behavior in office is good.

Mr. Chief Justice Taft, in his opinion in the Myers case, in commenting on the wide scope of presidential removals for cause and the discretion attached thereto, said:

> In all such cases the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his Cabinet officers must do his will. He must place in each

[76] 30 Stat. 18, sec. 1 (June 4, 1897).

member of his official family and his chief executive subordinates implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and coordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the Government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau when he discharges a political duty of the President or exercises his discretion and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.

But this is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that

the discretion regularly intrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise, he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

It will be seen, therefore, that as to cause for removal the widest and fullest discretion is vested in the Chief Executive, as without such discretion he would be unable to "take care that the laws be faithfully executed" [78] as provided for by the Constitution, and to which he took an oath to "preserve, protect, and defend" [79] to the best of his ability.

The Executive being a direct representative of the people and not of the Congress or any other department, he is responsible to the people alone for any irregularity coming under the executive department, and without this wide latitude of removal power it would be impossible for him to exercise and perform the duties of his office in conformity with the Constitution, as he would necessarily be restrained to no little extent in seeing that the laws of the United States were faithfully executed.

However, the great body of civil-service workers [80] should not change from administration to administration, but the executive and administrative officials upon whom the President must rely to carry out his policies must change, in order to carry into full effect the expressed will of the people of a popular government. A great number of high-salaried offices come under the civil service law, and it is therefore exceedingly difficult to draw a line where civil service should stop its attempt to reach the higher officials.[81] It would, however, seem to be a reason-

[78] Art. II, sec. 3, United States Constitution.

[79] Art. II, sec. 1, clause 8, United States Constitution.

[80] When President Harding became President there were some 450,000 civil-service workers, and it was not very long after he took the oath of office before he dismissed thousands under this classification.

[81] The Prohibition Unit was the latest to come under the civil service. Heretofore the majority of coworkers of this department were appointed through politics, and the Assistant Secretary of

ably sound doctrine that when a new administration comes into power with certain pledges to its party and people it should have a perfectly free hand to select all those higher officials to whom must be intrusted administrative policies, sympathies, and executive discretion, as without this discretionary and free will of selection the will of the people might be defeated.

Without offering any comment as to the wisdom of it, incoming administrations have thought it feasible to a progressive government to inaugurate a general economic policy, and have carried out this idea by the curtailment of expenses of operation in all the departments and in reducing the personnel to the minimum. This, of course, necessarily applied to and affected employees under the civil service, and no opposition should be manifested when great numbers of Federal employees are dismissed for the good of the service, especially when this feature of economy has not been carried to such an extent that it constitutes waste, expense, and false economy, and when the work can be carried on by reduced numbers.

President Coolidge, in one of his messages to Congress, in response to a resolution of the Senate that it was the sense of that body that the President should immediately request the resignation of the then Secretary of the Navy, replied:

> No official recognition can be given to the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control.
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> . . . The dismissal of an officer of the Government, such as involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government.[82]

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the Treasury had many embarrassing conferences with Members of Congress before he obtained legislation placing the employees of this unit under the classified civil service.

[82] 65 Congressonal Record, Feb. 13, 1924, p. 2335.

Chapter V

THE INTERPRETATION OF THE COURTS

Section 1. Officers.

As to what appointments are to come under the heading of "Officers of the United States" little can be said, as the Supreme Court of the United States has never laid down a clear and satisfactory interpretation of the term.

In a leading case [1] on this subject it was held that no person was an officer of the United States unless he had been appointed by the President, or by the head of a department authorized by law to make such appointment, or by a court of law. While this is a very poor and inadequate definition, yet it is one to be considered as of authority, as it bears judicial dignity. Its effect is to practically nullify the constitutional retrictions on the appointment of Federal officers. Mr. Justice Miller, in delivering the opinion in this case, said:

> The Constitution, for purposes of appointment, very clearly divides all of its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But, foreseeing that when offices became numerous and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specifically mentioned, Congress might by law invest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt.

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[1] United States *v.* Germaine (99 U. S. 508; 25 U. S. (L. ed.) 482). This was also held in United States *v.* Monat (124 U. S. 303; 8 S. Ct. 505; 31 U. S. (L. ed.) 463) and United States *v.* Smith (124 U. S. 525; 8 S. Ct. 595; 31 U. S. (L. ed.) 534.

Congress can provide for the appointment of many classes of Government employees in any manner it sees fit, and such enacted law would be constitutional under the above decision.

In confirming the doctrine applied in the Germaine case, the court held in the case of United States *v.* Monat [2] that—

> Unless a person in the service of the Government . . . holds his place by virtue of an appointment by the President or of one of the courts of justice or heads of departments authorized to make such an appointment, he is not, strictly speaking, an officer of the United States.

Following the decisions in these cases, it has been held in various jurisdictions by the courts that the following were not officers of the United States: A cashier of the mint appointed by the superintendent of the mint,[3] a merchant appraiser appointed for a particular appraisal,[4] customs clerks appointed by a collector of customs,[5] a pension surgeon,[6] or special agents of the General Land Office.[7] On the contrary, it has been held that a master in chancery for a Federal court is an officer of the United States;[8] also chaplains of Army hospitals;[9] letter carriers;[10] and Members of Congress within the meaning of a statute penalizing the false personation of such an officer.[11]

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[2] 124 U. S. 307.

[3] United States *v.* Cole (130 Fed. Rep. 614).

[4] Greeley *v.* Thompson (10 How. 225; 13 U. S. (L. ed.) 397).

[5] United States *v.* Smith (124 U. S. 532; 8 S. Ct. 595; 31 U. S. (L. ed.) 534).

[6] United States *v.* Germaine (99 U. S. 512; 25 U. S. (L. ed.) 482).

[7] United States *v.* Schlierholz (133 Fed. Rep. 333)

[8] Thomas *v.* Chicago, etc., R. Co. (37 Fed. Rep. 548).

[9] Officers—Chaplains for Army hospitals (1863), 10 Opinions of the Attorney General, 449.

[10] United States *v.* McCrary, 91 Fed. Rep. 296.

[11] Lamar *v.* United States (241 U. S. 103; 36 S. Ct. 535; 60 U. S. (L. ed.) 912)

As to whether there is any distinction between an officer of the United States and an officer of the Government of the United States we are without settled authority, as the Supreme Court declined to countenance any such distinction.[12] Both are public officers, as are all employees of the Government, irrespective of the capacity in which they serve the public, but apparently there is some distinction, as the courts have held a clerk appointed by the Secretary of the Treasury,[13] an engineer in the naval service appointed by the Secertary of the Navy,[14] justices of the peace in the District of Columbia,[15] and postmasters when appointed by the head of a department of the Federal Government [16] all are *public officers*.

There has likewise been considerable discussion as to just what officers constituted "inferior" officers. The term undoubtedly meant to include all those subordinate or inferior officers to those in whom the power of their appointment vested [17] and not merely those holding petty or unimportant positions. But it is now well established that "inferior" officers are those officers not requiring any formal action on the part of the Senate as to the approval or rejection of the appointee. Such officers are appointed either by the President alone, the courts, or by the heads of the different departments of the Government. Numerous offices come under this class of office and with the many vacancies constantly arising by reason of resignation, death, removal, and otherwise it would require almost the undivided time and attention of the

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[12] Wise *v.* Wittiers (3 Cranch, 331; 2 U. S. (L. ed.) 457).

[13] United States *v.* Hartwell (6 Wall. 385; 18 U. S. (L. ed.) 830). McCornick *v.* Thatcher (8 Utah, 294; 30 Pac. 1091; 17 L. R. A. 243).

[14] United States *v.* Perkins (116 U. S. 483; 6 S. Ct. 449; 29 U. S. (L. ed.) 700).

[15] Wise *v.* Wittiers, supra, 3 Cranch, 331; 2 U. S. (L. ed.) 457.

[16] Spence *v.* Harvey (22 Cal. 336; 83 Am. Dec. 69; 55 Am. Rep. 197; 5 N. E. 672). Keenan *v.* Southworth (110 Mass. 474; 12 Am. Rep. 613).

[17] Collins Case (14 Ct. Cl. 569).

Senate to attend to the details incident to filling them were that body given the jurisdiction over them. Little time would be left to the Senate to attend to the other and more important duties coming before it. The appointing authority, whether it be the President, the courts, or the department heads, are better able to fill such offices than such a numerous body as the Senate, as the recommendations submitted to the appointing authority in behalf of the likely incumbent are that the candidate's fitness, qualifications, and character were investigated and found worthy of the office and capable in filling it. The Constitution fails to specifically define the term "inferior" officer and the Supreme Court has never interpreted its true significance so as to settle every question as to what it really does imply. This court did, however, say that such officers were inferior to those specifically mentioned in the Constitution as requiring nomination by the President and confirmation by the Senate.[18]

It would appear that the number of classes of officers to be appointed by the President "with the advice and consent of the Senate" is very limited,[19] and there can be no question that, as to the appointing power of Congress, this body has considerable power and discretion reserved to itself in providing for the appointment of various officers of the secondary class.[20]

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[18] For a more elaborate discussion of this question, see Chapter IV, President Wilson's veto of the Budget bill, supra. See also Parsons *v.* United States (167 U. S. 324); Shurtleff *v.* United States (189 U. S. 311); United States *v.* Perkins (116 U. S. 483); Ex parte Hennen (13 Peters 230). These cases give the distinction between "inferior" and other officers.

[19] See Appendix, Principal Officers Appointed by the President, supra.

[20] Ex parte Siebold (100 U. S. 371, 379).

NOTE.—The term "officer" may be used in an act of Congress in a sense different from that given to it in the Constitution. (See United States *v.* Hendee, 124 U. S. 309; 8 S. Ct. 507; 31 U. S. (L. ed.) 465.)

Congress may prescribe certain conditions under which an appointee must first comply before being eligible to and entering upon the duties of a particular office.[21] It may likewise restrict the office to only those having certain qualifications. The creation of the Civil Service Commission and the prescribed requisites of all appointees to certain positions thereunder to be made out of a class of persons ascertained by proper tests to have such qualifications is an example of the exercise of this power on the part of Congress. Congress may also authorize the President to prescribe the qualifications and to put certain positions under the classified service [22] or to remove positions therefrom.[23]

The term "heads of departments" means the heads of the various executive departments, who constitute the President's Cabinet,[24] and not "inferior" officers. Congress has the fullest power to vest the appointment of such inferior officers as it deems fit, either in these heads of departments [25] or in the courts of law.[26]

However, no appointment to an office is completed until the commission has been delivered,[27] and the President may withhold the commission even after the appointment has been confirmed by the Senate.[28] The withholding of the commission by an officer other than the President in no way affects the appointment, as the

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[21] United States *v.* Le Baron (19 How. 73).

[22] Presidents Wilson and Harding in the reclassification of Federal employees just recently revised.

[23] Civil Service Commission (13 Op. Atty. Gen. 524); Matter of Miller (4 Mackay (D. C.), 512).

[24] Cooley, Thomas M. Principles of Constitutional Law (3d ed., p. 115).

[25] United States *v.* Hartwell (6 Wall. 393; 18 U. S. (L. Ed.) 830).

[26] Rice *v.* Adams (180 U. S. 378).

[27] Adam's Case. Right to Office—No Commission Delivered (1867) (12 Opinions of the Attorney General, 304).

[28] President's Power to Fill Vacancies During Recess of Senate (1866) (12 Opinions of the Attorney General, 41).

appointment is completed as soon as the President signs the commission.[29] The delivery of the commission has been completed as soon as the President turns it over to one of the heads of a department, even though such head of a department fails or refuses to turn it over to the appointee, or to the appointee himself.

Greater freedom in filling offices is allowed the President during the recess of the Senate,[30] when he can appoint an officer to any vacancy arising without the immediate ratification of the Senate, but such appointments only continue in effect until the close of the next session of the Senate.[31] In order that the President may have this extraordinary power, there must be an actual vacancy existing;[32] but it is not necessary that the vacancy must have first occurred during the recess of the Senate, it being sufficient if such vacancy continues to exist after the adjournment of the Senate.[33]

SECTION 2. FILLING VACANCIES IN OFFICE.

On the establishment of the several departments of the Government, the term "patronage" was introduced to extended fields, covering as it did every conceivable office. As soon as a vacancy was presumed, the appointing authority found a host of admirers heretofore unknown seeking office. The subject of vacancies has always offered endless discussion, as so many interpretations have been heretofore advanced as to when various offices became vacant and unfilled. However, some relief can now be reposed in the minds of the dubious office seekers in determining when an actual vacancy arises as the courts have had the matter before them time and time again and have settled many phases of this question.

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[29] Marbury *v.* Madison (1 Cranch, 137; 2 U. S. (L. ed.) 60).

[30] See Ch. VI, Recess Appointments by the President, supra.

[31] Constitution (Art. II, sec. 2, clause 3).

[32] Peck *v.* United States (39 Ct. Cl. 125).

[33] In re Yancey (28 Fed. Rep. 445).

The word itself as applied to a public office is without a technical meaning,[34] but its ordinary meaning is that a particular office is unoccupied and without an incumbent who has a lawful right to continue therein until the happening of some future event.[35] It has been held as a general rule that immediately upon the creation of a new office a vacancy exists at once.[36] A vacancy likewise exists even though the office has never been filled. There must, however, be an office, and if without an incumbent through death, resignation, etc., or the office never filled, the office is held to be vacant.[37] An office is not vacant so long as it is supplied in the manner provided by the Constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant in the eye of the law when it is not occupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event.[38] There is, however, a distinction between a vacancy in office and a vacancy in the term, the former implying that the office is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments.[39]

There are numerous ways in which a particular office might become vacant, and among the usual statutory grounds for recognizing that a public office is vacant may be mentioned the death of the incumbent,[40] his resignation,[41] his impeachment,[42] his removal from office because of physical or mental incapacities [43] or for any reason,

[34] State *v.* Harrison (3 A. S. R. 663).
[35] Futtrell *v.* Oldham (155 S. W. 503).
[36] People *v.* Hylan (212 N. Y. 236).
[37] Walsh *v.* Com. (33 Am. Rep. 771).
[38] State *v.* Harrison (3 A. S. R. 663).
[39] State *v.* Corcoran (206 Mo. 1).
[40] Edwards *v.* United States (103 U. S. 471; 26 U. S. (L. ed.) 314).
[41] Ibid.
[42] State *v.* Lansing (46 Neb. 514; 64 N. W. 1104; 35 L. R. A. 124).
[43] Edwards *v.* United States (103 U. S. 471; 26 U. S. (L. ed.) 314).

acceptance of an incompatible office,[44] insanity,[45] or the conviction of the incumbent for a felony [46] or any crime involving a violation of his official duties.[47] A vacancy also exists where the appointing or electing power appoints another to a particular office,[48] even though the present incumbent continues to physically occupy it and refuses to relinquish his apparent rights to it to the new appointee.[49]

There is no vacancy to an office held by one incompetent to exercise the duties coming under that office, and before a vacancy really exists the appointing power is obliged to nominate and appoint another in the stead of the incompetent incumbent.[50] Where an appointee dies before entering upon his official duties or before he is confirmed by the Senate, there can be no question but what the office is vacant and that the President can nominate another to the office.

Where a commission is to be issued there seems to be a distinction between cases where it is to be signed by the appointing power and where it is to be issued by another. If the commission is to be signed by the appointing power, its issuance is essential to a completion of the appointment. In a leading case, Marbury *v.* Madison,[51] Mr. Marbury had been appointed by Mr. Adams a justice of the peace in the District of Columbia, his term of office to continue for a period of five years. The appointment was a "midnight appointment," and his commission,

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[44] Haymaker *v.* State (1917D, L. R. A. 210).

[45] State *v.* Lansing (46 Neb. 514; 64 N. W. 1104; 35 L. R. A. 124).

[46] People *v.* Schorb (100 Cal. 437; 35 Pac. 163).

[47] Ibid.

[48] Blake *v.* United States (103 U. S. 227). Wallace *v.* United States (257 U. S. 541; 258 U. S. 296).

[49] Haymaker *v.* State (1917D, L. R. A. 210).

[50] State *v.* Boucher (56 N. W. 528; 27 A. S. R. 412).

[51] 1 Cranch, 137; 2 U. S. (L. ed.) 60.

though signed, sealed, and deposited in the Department of State, had not come into his hands. Mr. Jefferson withheld it, whereupon Mr. Marbury instituted suit against Mr. Madison to compel its delivery. While the remedy applied for did not properly come within the jurisdiction of the court, yet the question of removal was fully treated, and the opinion of the court was expressed by Chief Justice Marshall in the following words:

> It is, therefore, decidedly the opinion of the court that when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.
>
> Where an officer is removable at the will of the Executive, the circumstance which completes his appointment is of no concern, because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the Executive, the appointment is not revocable and can not be annulled. It has conferred legal rights which can not be resumed. The discretion of the Executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

The opinion on this question, which was one of three considered by the court, closed with the statement:

> Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years independently of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

The question of whether the nondelivery of the commission constituted a removal of Mr. Marbury was not an issue of any argument before the court. Had this question been properly raised and the court called upon to pass upon it, the court would have held that the President was without power to effect Mr. Marbury's removal,

as will be noted in an expression of the Chief Justice's opinion:

As the law creating the office gave the officer a right to hold it for five years independent of the Executive, the appointment was not revocable but vested in the officer legal rights which are protected by the laws of his country.

While everything that the great Chief Justice said, whether obiter dictum or not, challenges the highest and most respectful consideration, it is clear that the mere statement of the conclusion made by him, without any examination of the discussion which went on in the First Congress, and without reference to the elaborate arguments there advanced to maintain the decision of 1789, can not be regarded as authority in considering the weight to be attached to that decision, a decision which, as we shall see, he subsequently recognized as a well-established rule of constitutional construction.[52]

The great Chief Justice, however, later changed his mind, as four years after his decision in the Marbury *v.* Madison case he wrote his full account of the discussion and decision in the First Congress and his acquiescence in it in the following words:

". . . After an ardent discussion which consumed several days the committee divided; and the amendment to strike out from the original bill the words 'to be removable by the President' was negatived by a majority of 34 to 20. The opinion thus expressed by the House of Representatives did not explicitly convey their sense of the Constitution. Indeed, the express grant of the power of the President rather implied a right in the Legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson (later) moved in the House, when the report of the Committee of the Whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal solely in the President. He gave notice that if he should succeed in this he would move to strike out the words which have been the subject of debate. . . . The motion was seconded by Mr. Madison, and both amendments were adopted.

[52] Chief Justice Taft in Myers *v.* United States (47 S. C. 21, 1926).

As the bill passed into a law, it has ever been considered as a full expression of the sense of the Legislature on this important part of the American Constitution." [53]

It was also said by the court in the Marbury case that—

When a person appointed to any office refuses to accept that office, the successor is nominated in place of the person who has declined to accept, and not in place of the person who had been previously in office and had created the original vacancy.

From this opinion, therefore, when a person has been nominated to an office by the President, confirmed by the Senate, and his commission signed by the President, and the seal of the United States affixed thereto, his appointment to that office is complete. The transmission of the commission to the officer is not essential to his right to the office. If by any inadvertence or accident it should fail to reach him, his possession of the office is nevertheless as lawful as if it were in his custody, for, as the court held, if this were not true the appointee might be deprived of his office by reason of its nondelivery, not only through negligence but by reason of fire or theft or fraud. It is but evidence of those acts of appointment and qualification which constitute his title and which may be proved by other evidence where the rule of law requiring the best evidence does not prevent.[54]

It would appear that " the commission and appointment appear inseparable, it being almost impossible to show an appointment otherwise than by proving the existence of a commission," yet in the case just cited it was held that the affixing of the seal by the Secretary of State was no part of the appointment, nor was it essential to its validity, it being a mere ministerial duty to be performed by a ministerial officer and not by the appointing power.

It would, therefore, follow by the decision in the Marbury case that if neither a tenure of office act nor any

[53] Marshall's Life of Washington, Vol. V, pp. 192–200. 3 Beveridge, Life of Marshall, pp. 248, 252, 272, 273.

[54] United States *v.* LeBaron (19 How. 73; 15 U. S. (L. ed.) 525).

other statute prescribed the term of a particular office the President could then immediately revoke the commission by nominating another to the office, and the nominee, even pending his confirmation, would be exercising his legal rights in immediately assuming the office. But where the appointee has already been confirmed by the Senate and a statute expressly states that the incumbent or appointee is to hold the particular office for a specified term of years, the Executive is without power to remove the incumbent.

This decision has since been reversed by the Supreme Court, but it is interesting to note that our courts when first called upon to express an opinion on the question believed that this offered an effective check to remove at will on the part of the Executive or other appointing officer, and the appointing authority without the power to remove one where the law specifically prescribed the term of office, even though he might later have another as his choice for the office, and should the incumbent later, in the performance of his official duties, serve adversely to the best interests of his office and country, he could not be removed outright by the appointing authority, but would first have to be impeached, and that unless the charges against the officer were well taken and proven, under the tenure law he would be eligible to continue his office until the expiration of his term of office as provided by the tenure law.

Section 3. Steps Incident to Taking Office.

Generally there are certain incidental steps imposed upon appointees before they can enter upon their official duties, and where the law provides such prerequisites, appointees can not escape compliance and at the same time be in legal possession of their office, even though already elected and appointed, or to have any legal right to the office. Where a public officer is required to furnish bond

for the faithful performance of his duty,[55] he can not acquire any legal recognition as such until a bond meeting the statutory requirements has been furnished.[56] With most public officers the filing of a bond is mandatory, and where such is the case the wanton failure to furnish the required bond by the appointee, even after being duly nominated and confirmed by the Senate, will result in the forfeiture to all rights to the office and the office held vacant.[57] Where the filing of a bond is not mandatory,[58] the noncompliance would not work a forfeiture to the right to the office, as the contrary doctrine that the filing of a bond is merely a ministerial act for the security of the Government, has been announced in some cases.[59]

The taking of a prescribed oath before entering upon the official duties of an office is likewise a step incidental to having a legal right to a particular office.

Unlike the common law of England where an officer was created by letters patent without the necessity or compulsion to be sworn prior to entering upon his official duties, in the United States, where an oath is requisite before entering upon the discharge of official duties, such oath is an essential part of the appointment and considered as one of the qualifications and must be complied with.[60] Should the appointee fail or refuse to take the prescribed oath after a reasonable length of time, the of-

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[55] Soule *v.* United States (100 U. S. 8; 25 U. S. (L. ed.) 536).

[56] Broome *v.* United States (15 How. 143; 14 U. S. (L. ed.) 626).

[57] State *v.* Beloit (21 Wis. 280).

[58] The filing of a bond was held not mandatory in United States *v.* Eaton (169 U. S. 331; 18 S. Ct. 374; 42 U. S. (L. ed.) 767).

[59] United States *v.* Bradley (10 Pet. 343; 9 U. S. (L. ed.) 448). Glavey *v.* United States (182 U. S. 595; 21 S. Ct. 891; 45 U. S. (L. ed.) 1247).

[60] Robertson *v.* Robinson (65 Ala. 610); Ex parte Yale (24 Calif. 241); In re Advisory Opinion to Governor (65 Fla. 434); Glascock *v.* Lyons (20 Ind. 1); Archer *v.* State (74 Md. 443); Election Supervisors (114 Mass. 247); American Steamship Co. *v.* Young (89 Pa. St. 186); State *v.* Humphries (74 Tex. 466).

fice will be considered as vacant [61] and the appointee can not later set up any legal claim to the office after the nomination of his successor.

The general qualifications of an appointee, such as education, experience, training, and ability, are, as a rule, predetermined and considered as prerequisites incidental to appointment, but it often happens that after an appointee assumes office it develops that he is unfitted to perform and discharge the duties of the office. The Supreme Court has repeatedly asserted that all officers of the Government from the highest to the lowest are creatures of the law and are bound to obey it,[62] and a failure on the part of an incumbent to satisfactorily perform and prosecute his defined duties, or the malfeasance of them, will prompt his removal. It was further held that the powers of each are limited, and while some exercise powers which are defined in the fundamental law, the larger portion of them are of statutory creation with duties and powers prescribed and limited by law.[63] While with most officers the duties are expressly defined by law, yet usage and custom, it has been held, are often the basis of ascertaining the duties and functions coming under a particular office.[64]

SECTION 4. REMOVALS.

As has already been repeatedly shown in the preceding pages, the power of removal is incident to the power to appoint,[65] and, irrespective of any designated term or ten-

[61] State *v.* Lansing (46 Nebr. 514; 64 N. W. 1104; 35 L. R. A. 124).

[62] The Floyd Acceptances (7 Wall. 666; 19 U. S. (L. ed.) 169); United States *v.* Lee (106 U. S. 196; 1 S. Ct. 688; 50 U. S. (L. ed.) 171); Burton *v.* United States (202 U. S. 344; 26 S. Ct. 688; 50 U. S. (L. ed.) 1057).

[63] The Floyd Acceptances (7 Wall. 666; 19 U. S. (L. ed.) 169).

[64] United States *v.* Tingy (5 Pet. 115; 8 U. S. (L. ed.) 66).

[65] Keim *v.* United States (177 U. S. 290; 20 S. Ct. 574; 44 U. S. (L. ed.) 774); Reagan *v.* United States (182 U. S. 419; 21 S. Ct. 842; 45 U. S. (L. ed.) 1162); Ex parte Hennen (13 Pet. 230; 10 U. S. (L. ed.) 138).

ure, all presidential appointments are at any time and for any cause, or at the will and pleasure of the President, or the head of a department, removable by him, and the office is held by the incumbent during such pleasure of the authority making the appointment.[66] The removal of all such appointed officers at the will or caprice of the appointing power is not unconstitutional, in the absence of any provision to the contrary,[67] and this view has always been so manifested by all succeeding administrations from the very formation of our Government, as hereinbefore noted, and is now firmly established by our courts.

The United States Supreme Court has, since the tenure of office act, manifested an earnest desire to avoid a final settlement of this question until the question was properly brought before it, as it was in the case of Myers *v.* United States.[68] However, the courts, including the United States Supreme Court, have heretofore had certain phases of this question repeatedly before them and have held that each of the three departments of government are separate and distinct and not interdependent. From this division on principle the reasonable construction of the Constitution must be that the branches of government should be kept separate and distinct in all cases in which they were not interdependent, and the Constitution should be so interpreted and construed.[69]

Mr. Webster, the earliest and greatest expounder of the Constitution, denied that the vesting of the executive power in the President constituted a grant of power,[70] but the views taken by him were not at all in accord with the usual canon of interpretation of that instrument by the Supreme Court, which has held that unqualified, un-

[66] State *v.* Smith (36 Nebr. 13; 52 N. W. 700; 16 L. R. A. 791).

[67] Trainor *v.* Board of Auditors (89 Mich. 162; 15 L. R. A. 95).

[68] 47 S. Ct. 21. 1926.

[69] Merriwether *v.* Garret (102 U. S. 472, 515); Kilbourn *v.* Thompson (103 U. S. 168, 190); Mugler *v.* Kansas (123 U. S. 623, 662).

[70] 4 Webster, pp. 179, 198.

conditional, and real effect should be given to all the words of the Constitution, without any implication.[71]

The United States Supreme Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years, fixes the construction to be given its provisions.[72]

The vesting of the executive power in the President was essentially a grant of the powers to execute the laws. But the President alone and unaided could not execute them; he must execute them by the assistance of subordinates.[73]

The principle as a rule of constitutional and statutory construction that the first section of Article II not only granted to the President the power of removal, but the express recognition of the power of appointment in the second section.[74]

The prevailing effect of the legislative decision of 1789 was fully decided by the Supreme Court in Ex parte Hennen, where the question as to the legality of the

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[71] Prout *v.* Starr (188 U. S. 537, 544); Hurtado *v.* California (110 U. S. 516, 534); Prigg *v.* Pennsylvania (16 Pet. 539, 612); Holmes *v.* Jennison (14 Pet. 540, 570–571); Cohens *v.* Virginia (6 Wheat. 264, 398); Marbury *v.* Madison (1 Cranch, 137).

[72] Stuart *v.* Laird (1 Cranch, 29, 309); Martin *v.* Hunter's Lessee (1 Wheat. 304, 351); Cohens *v.* Virginia (6 Wheat. 264, 420); Prigg *v.* Pennsylvania (16 Pet. 544, 621); Cooley *v.* Board of Wardens, etc. (12 How. 299, 315); Burrows-Giles Lithographing Co. *v.* Sarony (111 U. S. 53, 57); Ames *v.* Kansas (111 U. S. 449, 463–469); *The Laura* (114 U. S. 411, 416); Wisconsin *v.* Pelican Insurance Co. (127 U. S. 265, 297); McPherson *v.* Blacker (146 U. S. 1, 28, 33, 35); Knowlton *v.* Moore (178 U. S. 41, 56); Fairbank *v.* United States (181 U. S. 283, 308); Ex parte Grossman (267 U. S. 87, 118).

[73] Wilcox *v.* Jackson (13 Pet. 498, 513); United States *v.* Eliason (16 Pet. 291, 302); Williams *v.* United States (1 How. 290, 297); Cunningham *v.* Neagle (135 U. S. 1, 63); Russell Co. *v.* United States (261 U. S. 514, 523).

[74] Ex parte Hennen (13 Pet. 230, 259); Reagan *v.* United States (182 U. S. 419); Shurtleff *v.* United States (189 U. S. 311, 315).

removal from office by a United States district court of its clerk, appointed by it under section 7 of the judiciary act,[75] arose, and in its opinion the court said:

The Constitution is silent with respect to the power of removal from office where the tenure is not fixed. It provides that the judges, both of the Supreme and inferior courts, shall hold their offices during good behavior. But no tenure is fixed for the office of clerk. . . . It can not for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed and upon which a great diversity of opinion was entertained in the early history of this Government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was whether the removal was to be by the President alone or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove where the tenure of the office was not fixed by the Constitution, which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution. For in the organization of the three great departments of State, War, and Treasury in the year 1789 provision is made for the appointment of a subordinate officer by the head of the department, who should have the charge and custody of the records, books, and papers appertaining to the office when the head of the department should be removed from office by the President of the United States. When the Navy Department was established in the year 1798 provision was made for the charge and custody of the books, records, and documents of the department in case of vacancy in the office of Secretary, by removal or otherwise. It is not here said, by removal by the President, as is done with respect to the heads of the other departments; and yet there can be no doubt that he holds his office by the same tenure as the other Secretaries and is removable by the President. The change of phraseology arose, probably, from its having

[75] 1 Stat. 76, ch. 20.

become the settled and well-understood construction of the Constitution that the power of removal was vested in the President alone in such cases, although the appointment of the officer was by the President and Senate.[76]

Many cases have been before the courts wherein the question of the removal authority arose, and where the courts have held that this removal prerogative vested in the appointing authority.

In a suit brought to enjoin a postal inspector from taking charge of a post office, wherein the court considered the constitutional power of the President to appoint and remove from office, held that this power of removal vested in the President,[77] and where the Secretary of the Treasury removed from office on charges of misconduct, even though later reinstated by Executive order because the charges were not sustained, the court held that the power of appointment and removal in this case was in the Secretary of the Treasury, stating—

it is within the power of Congress to confer this authority on the Secretary.[78]

That " the power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint," [79] there can be no doubt, and the President may remove an officer by nominating another in his place and getting the Senate to confirm the nomination,[80] even without any notice to the Senate that the successor was to take the place of the officer so removed.[81]

Officers may be removed by the appointing authority for any reason, and the fact that the Federal Constitution provides that all civil officers shall be removed from office on conviction of treason, bribery, or other high crimes and

[76] 13 Peters, 230, 259.
[77] Porter *v.* Coble (D. C.) (246 Fed. 244).
[78] Eberlein *v.* United States (66 U. S. (L. ed.) 26).
[79] Burnap *v.* United States (252 U. S. 513; 64 (L. ed.) 692).
[80] Blake *v.* United States (103 U. S. 227).
[81] Wallace *v.* United States (257 U. S. 541; 258 U. S. 296).

misdemeanors does not imply that they can not be removed for other causes.[82] Not infrequently are public officers removed for nonfeasance, misfeasance, or malfeasance of the duties coming under their offices,[83] or for malconduct while in office.[84] Public officers of the United States and all Federal employees are servants of the people, and while serving as such are expected to perform all the duties coming directly under the office they hold in a faithful manner, and for any neglect in duty are subject to removal.[85] Should the incumbent be found to be inefficient, incompetent, or incapacitated to perform the official duties of his office, he is likewise subject to removal.[86] Federal employees may, for the good of the service, be given furloughs without pay at any time on the theory that this constitutes a partial dismissal and is, therefore, included in the power to dismiss absolutely.[87]

The President's power of removal was held not to be restricted by an act of Congress defining certain causes for removal.[88] Since the provision for an Interstate Commerce Commission in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President, as we have already observed.

From this version there can be no question as to the removal power of the President being sufficiently broad

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[82] Shurtleff *v.* United States (189 U. S. 311; 23 S. Ct. 535; 100 U. S. (L. ed.) 828).

[83] Ibid.

[84] State *v.* Crump (134 Tenn. 121; 1916D L. R. A. 951).

[85] Shurtleff *v.* United States, supra.

[86] Ibid.

[87] United States *v.* Murray (100 U. S. 536; 25 U. S. (L. ed.) 756).

[88] Shurtleff *v.* United States, supra.

to cover any grounds, even though for no other reason than to fulfill his desire in having another substituted, and where a reason is to accompany the discharge, the term "for the good of the service" will suffice.

The provision under Article II, section 2, "but the Congress may by law vest the appointment of inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments," has been defined to give to Congress the power to limit and regulate removal of such inferior officers by heads of departments when it exercises its constitutional power to lodge the power of appointment with them, and excludes congressional dealing with appointments or removals of executive offices not falling within the exception and leaves unaffected the executive power of the President to appoint and remove them.[89]

According to the customs administrative act of June 10, 1890,[90] a board of general appraisers was established. The members of this board were to serve for an indefinite term and were to be removable by the President for "inefficiency, neglect of duty, or malfeasance in office." This board was spoken of as a customs administrative court, and it appears as though it was the intention of Congress to confer upon its members a tenure akin to that of the Federal judiciary.[91] It had been held by the State courts, and by the Supreme Court itself, that in cases of removals from office on specific grounds "notice" and "hearing" were essential.[92] When, therefore, an appraiser named Shurtleff was removed from his office without any notice given him or a hearing held relative to the charge against him, he immediately brought suit in the

[89] United States *v.* Perkins (116 U. S. 483, 485).

[90] 26 Stat. 131, 136, ch. 407, sec. 12.

[91] Fairlie, J. A. Administrative Powers of the President. (Michigan Law Review, December, 1903, pp. 193–199.)

[92] Dullan *v.* Willson (53 Mich. 324); Reagan *v.* U. S. (182 U. S. 419).

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United States Court of Claims for salary due from May 15 (date of his removal) to November 1, 1899 (the time of filing suit in the Court of Claims).[93]

During the trial it was forcibly contended that the affirmative language of the statute implied the negative of the power to remove except for cause and after a hearing. This would have been the usual rule of construction, but the court declined to apply it. Assuming for the purpose of that case only, but without deciding, that Congress might limit the President's power to remove, the court held that in the absence of constitutional or statutory provision otherwise the President could by virtue of his general power of appointment remove an officer, though appointed by and with the advice and consent of the Senate and notwithstanding specific provisions for his removal for cause, on the ground that the power of removal inhered in the power to appoint. This is an indication that many of the statutes cited are to be reconciled to the unrestricted power of the President to remove, if he chooses to exercise his power.

The Supreme Court in sustaining the action of the President said:

> In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.[94]

In the case of McAllister *v.* United States,[95] a judge of the District Court of Alaska, it was held, could be de-

[93] Shurtleff *v.* United States (189 U. S. 311; 23 S. C. 535; 100 U. S. (L. ed.) 828).

[94] Shurtleff *v.* United States, supra. The provision of the Constitution that the President shall take care that the laws be faithfully executed is sweeping in its scope. In re Neagle (135 U. S. 1, 64).

[95] 141 U. S. 174.

prived of a right to salary as such by his suspension under Revised Statutes 1768. That section gave the President in his discretion authority to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the courts of the United States, until the end of the next session of the Senate, and to designate some suitable person subject to be removed in his discretion by the designation of another to perform the duties of such suspended officer. It was held that the words "except judges of the courts of the United States" applied to judges appointed under Article III and did not apply to Territorial judges, and that the President under Revised Statutes 1768 had power to suspend a Territorial judge during a recess of the Senate, and no recovery could be had for salary during that suspended period.

The question of whether or not under the Constitution the President has exclusive power of removing executive officers of the United States who he had appointed by and with the advice and consent of the Senate arose, and was finally decided in the recent case of Myers *v.* United States.[96]

Briefly stating the facts, Myers was appointed on July 21, 1917, by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Oreg., for a term of four years. On January 20, 1920, the resignation of Myers was demanded, but he refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President, and his salary, of course, automatically ceased. Myers, however, insisted that he still had the right to the office, and made no effort to pursue any other occupation. The following August the President made a recess appointment of one Jones, who took office September 19, 1920. Myers asserted that the order of his removal was illegal, as it conflicted with the

[96] 47 S. Ct. 21 (1926).

law under which he was appointed and held office. According to the sixth section of the act of Congress of July 12, 1876,[97] under which postmasters are appointed, Myers contended that the Senate must approve of the removal. This section reads as follows:

> Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law; . . ."

This case, after being heard in the Court of Claims, reached the Supreme Court to pass upon the question as to the legality of the act in so far as it conflicted with Article II of the Constitution in attempting to restrict and limit the President's removal authority and power, and by its decision of October 25, 1926, this court decided in favor of the Government. Chief Justice Taft delivered the opinion of the court and after a very lengthy and exhaustive report concluded as follows:

> While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the reference it has made to the history of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and can not ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the tenure of office act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him and with the advice and consent of the Senate, was invalid and that subsequent legislation of the same effect was equally so. For the reasons given we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid.

As hereinbefore noted, and by the above decision, it would seem that "the President's power to remove is not solely attributable to the power to appoint. If it

[97] 19 Stat. 80, 81, ch. 179.

were, the decision would not fully protect the independence of the Executive; for, as to the inferior officers, Congress might vest the power of appointment in the heads of departments and thus deprive the President of his power to remove them. As the President's power to remove is based upon constitutional authority, and incident to the executive power, it would seem that he would continue to have the power to remove executive officers even though the power of appointment were taken from him." [98]

Under the prevailing decisions, therefore, the President's power to remove all officers in the executive branch of the Government service is beyond question, and " our conclusion on the merits sustained by the arguments before stated is that Article II grants to the President the executive power of the Government—that is, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals except only as granted therein to Congress in the matter of inferior officers; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President, with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or any part of it, in the work of the Executive are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice

[98] The Cornell Law Quarterly, Vol. XII, No. 1, p. 70, December, 1926.

of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.[99]

SECTION 5. DE FACTO AND DE JURE OFFICERS.

Where a person duly nominated and appointed or elected to a given office enters upon the official duties of that office after complying with all the prerequisites incidental thereto, he is a de jure officer, but where he claims any right to such office before complying with the conditions reposed in the same he becomes an officer de facto. The latter is true even though the officer holds and performs the duties of the office for a prolonged period without removing the impediment which constituted a part of the qualifications to the fulfillment of the post. After the removal of the impediment, whether before or after entering upon his official duties, the officer then becomes a de jure one.

Lord Ellenborough has defined an officer de facto as one that has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. This definition has been quoted with approval in many cases.[1]

In State *v.* Carroll,[2] it was held that a person is a de facto officer where the duties of the office are exercised:

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[99] Myers *v.* United States (47 S. Ct. 21). 1926.

NOTE.—There were 50,257 postmasters on July 1, 1925. The magnitude of this decision extends the presidential power over such important administrative-judicial boards as the Interstate Commerce Commission, the Federal Trade Commission, the Tariff Commission, the Federal Reserve Board, the Board of General Appraisers, and the Board of Tax Appeals.

[1] Waterman *v.* Chicago, etc., R. Co. (139 Ill. 658); Petersilea *v.* Stone (119 Mass. 465); Oliver *v.* Jersey City (63 N. J. L. 634).

[2] 28 Conn. 449; 9 Am. Rep. 409.

1. Without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumes to be.

2. Under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like.

3. Under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.

4. Under color of an election or an appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such.

In contradistinction to an officer de facto, an officer de jure is one who is in all respects legally appointed and qualified to exercise the office.[3] A de jure officer has the lawful right or title, without the possession of the office, while a de facto officer has the possession and performs the duties under color of right, without being qualified in law to act; and both are to be distinguished from a mere usurper, who has neither title nor color of right.[4] Another important difference between these two classes of officers is that an officer de facto may be ousted in a direct proceeding against him, while a de jure officer can not be so removed.[5]

If after the appointment of a successor to an officer de jure, the de jure officer holds over and refuses to vacate the position, he then immediately becomes an officer de facto,[6] even without judicial determination as to the right of the appointing power in so removing the incumbent.

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[3] Plymouth *v.* Painter (17 Conn. 585; 44 Am. Dec. 574).

[4] Hamlin *v.* Jassafer (14 Oreg. 456; 3 A. S. R. 176).

[5] People *v.* Staton (73 N. C. 546; 21 Am. Rep. 479).

[6] Ekern *v.* McGovern (154 Wis. 157; 142 N. W. 595; 46 L. R. A. (N. S.) 796; Petersilea *v.* Stone (119 Mass. 465; 20 Am. Rep. 335).

Chapter VI

RECESS APPOINTMENTS BY THE PRESIDENT

Under Article II, section 2, clause 3, of the Constitution, " The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." [1]

There is no distinction between an appointment and a nomination other than the fact that the President nominates for appointment when the Senate is in session and appoints when he fills a vacancy temporarily during the recess of the Senate.[2]

One appointed to office when the Senate was not in session, who entered upon the duties of the office and continued to serve until notified that his nomination had been rejected, must be deemed to have been legally appointed and entitled to the office.[3]

In 1813 President Madison appointed and commissioned ministers to negotiate the Treaty of Peace of Ghent, during the recess of the Senate, and the question arose whether he had a constitutional authority to do so, there being *no vacancy* of any existing office, but this being the creation of a new office. The Senate at its next session entered a protest against such an exercise of power on the part of the Executive, and on a subsequent occasion, April 20, 1822, they seemed distinctly to have

[1] As to when a vacancy exists, see Ch. V, sec. 2, Filling Vacancies in Office, supra. There must be a vacancy before an appointee can enter upon the official duties of a particular office.

[2] President—Appointment of Officers—Holiday Recess (1901) (23 Opinions of the Attorney General, 599).

[3] Gould *v.* United States (1884) (19 Ct. Cls. 593).

held that the President could not create the office of minister and make appointments to such an office during the recess without the consent of the Senate. By "vacancies" they understood to be meant vacancies occurring from death, resignation, promotion, or removal. The word "happen" had relation to some casualty not provided for by law. If the Senate is in session when offices are created by law, which have not as yet been filled, and nominations are not then made to it by the President, he can not appoint to such offices during the recess of the Senate because the vacancy does not happen during the recess of the Senate. In many instances, where offices are created by law, special power is, on this very account, given to the President to fill them during the recess; and it was then said that in no other instances had the President filled such vacant offices without the special authority of law.[4] The Senate raised the question that the office first existed during the recess, thus conceding the President's power to make it; but no vacancy in the office so created *happened* in the recess. The office was empty; there was a vacancy in it because it had never been filled; but a vacancy did not happen. The Senate, however, protesting, confirmed the nomination.[5]

In August, 1898, the Senate being in recess, the President sought to advance Commodore Schley to be a rear admiral, for "eminent and conspicuous conduct in battle."

Supposing that a vacancy was thereby caused in the grade of commodore, the President advanced Captain Higginson to the grade of commodore, and other officers to fill other supposed vacancies, until the claimant, a lieutenant, was advanced to the grade of lieutenant commander.

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[4] Sergeant, Thomas. Constitutional Law (2d ed.). Philadelphia, 1830. Vol. 2.

Executive Journal (1822) (1st sess., 17th Cong.). Vol. III, pp. 415, 500.

Executive Journal (1822) (1st sess., 17th Cong.). Vol. III, p. 297.

[5] Tucker on the Constitution. Vol. 2, pp. 740–742.

The officers so advanced were recognized by the departments and paid accordingly. In December, the Senate being in session, the nomination of Commodore Schley was not acted upon, but the promotions of the other officers under him were confirmed, including the claimant, whom the President commissioned. Subsequently it was held by the accounting officers that there were no vacancies to which these officers could be appointed, and the overpayments to them were deducted. The ruling of the accounting officers was correct, as the language of the Constitution, "to fill up all vacancies that may happen during the recess of the Senate," necessarily implies, not only the previous existence of an office, but that "during the recess of the Senate" a vacancy happened in such office which could be filled by the President by commission to expire at the end of the next session of Congress.[6]

This clause of the Constitution[7] was adopted to prevent the inconveniences of vacancies in the first class of offices, when the recess of the Senate would make it impossible to fill them. Official duties were thus secured without interruption, by allowing the Executive the exclusive power of appointment; but these appointments were to be but temporary. An accidental vacancy was not to change the mode of permanent appointment, and as no limit could be conveniently fixed during the ensuing session of the Senate, the temporary appointment was made to endure until the end of such session. During the session, however, the usual mode of appointment was practicable.

If a temporary appointment expires at the end of the session, without any permanent appointment with the consent of the Senate, it is held that a vacancy occurs in the succeeding recess, and this even though the President nominates during the session and the Senate objects or when he fails to nominate; for as the temporary ap-

[6] Peck *v.* United States (1904) (39 Ct. Cl. 125).

[7] Constitution, Art. II, sec. 2, clause 3.

pointment continues until the end of the session, when by the terms of this clause it expires, then the vacancy occurs at the end of the session (at the expiration of the temporary appointment) and the President may fill it in the ensuing recess.[8] So a vacancy first occuring during the session of the Senate may be filled in the succeeding recess, for the vacancy happens in that recess, though it existed before the recess.[9]

It has been also held that if the office be created by Congress during the session, and the President fails to nominate, he can not appoint during the recess. The office never having been filled, no vacancy could have occurred. If the President appoints with a commission in the recess, both appointment and commission expire at the end of the next session. If during the session he nominates the same person, and the Senate concurs and such person be commissioned, then the liability under the bond given by such person, upon his temporary appointment during the recess, ceases as soon as the officer accepts the new appointment made by the President and Senate.[10]

The power conferred by this clause is not confined to vacancies which may happen in offices created by law.[11] An office becomes vacant when the incumbent, having tendered his resignation, receives notice from the proper authorities that the same has been accepted.[12] An act

[8] Executive Authority to Fill Vacancies (1823) (1 Opinions of the Attorney General, 631).

Power of the President to Appoint to Office During Recess of Senate (1846) (4 Opinions of the Attorney General, 523, 525); Power of President to Fill Vacancies (1841) (3 Opinions of the Attorney General, 673); Appointing of Judges, etc., for Iowa and Florida (1845) (4 Opinions of the Attorney General, 361).

[9] President's Power to Fill Vacancies in Recess of Senate (1866) (12 Opinions of the Attorney General (4–6), 32).

[10] United States *v.* Kirkpatrick (9 Wheat. 720).

[11] United States *v.* Maurice (2 Brock. 96; Fed. Cas. No. 15, 747).

[12] Mimmack *v.* United States (97 U. S. 437; 24 U. S. (L. ed.) 1067).

making it unlawful for a person to hold more than one office does not create a vacancy in either until the incumbent elects which to retain.[13] The commission of an officer appointed during a recess, and afterwards nominated and rejected, continues in force until the next session.[14] If, however, the Senate should concur in the appointment, it then becomes a new appointment and a new bond will be required.[15] Whenever an applicant appears with a commission signed by the President appointing him a marshal to fill a vacancy created during a recess, it is the duty of the district judge to take his bond and administer the oath, regardless of any question of the President's power.[16]

Neither can the President make a temporary appointment during a recess if the Senate was in session when or since the vacancy occurred.[17]

The President has constitutional power to appoint, by temporary commission, a diplomatic officer to meet any public exigency arising in the recess of the Senate. But for the President to change the personnel or raise the rank of the entire diplomatic service of the United States, in the recess of the Senate, and without the concurrence of that coordinate authority, would not be a just exercise of the presidential discretion, whether in its relation to the ministers themselves, to the public service, or to the spirit of the Constitution.[18]

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[13] United States *v.* Harsha (172 U. S. 572; 19 S. Ct. 294; 43 U. S. (L. ed.) 556).

[14] Hill's case—Commissions Granted During Recess of Senate (1830) (2 Opinions of the Attorney General, 336); Tyson's case—Tenure of Appointments Made During Recess of the Senate (1842) (4 Opinions of the Attorney General, 30).

[15] United States *v.* Kirkpatrick (9 Wheat. 733; 6 U. S. (L. ed.) 199).

[16] In re Yancey (28 Fed. 445).

[17] Case of the District Attorney (16 Am. Law. Reg. 786).

[18] Ambassadors and Other Public Ministers of the United States (1855) (7 Opinions of the Attorney General, 188).

The power of the President to fill a vacancy in the Army during the recess of the Senate may be exercised by a letter from the Secretary of War to the person to be appointed, stating that the President has appointed him to the office, and such a letter may constitute his commission, and is conclusive evidence that the President has made the appointment.[19]

In cases where appointments have been made in the recess of the Senate prior to the last session of the Senate, and there was a failure during the session to make a permanent appointment, either by the refusal of the Senate to confirm the nominee, a failure to act on the nomination, or other cause, the President can make another temporary appointment in the present recess.

The Attorney General, in ruling on this question, said:

> The true theory of the Constitution in this particular seems to me to be this: That as to the executive power, it is always to be in action, or in capacity for action; and that, to meet this necessity, there is a provision against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session, they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone. All that is to be looked to is that there is a vacancy, no matter when it first occurred, and there must be a power to fill it. If it should have been filled whilst the Senate was in session, but was not then filled, that omission is no excuse for longer delay, for the public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session.[20]

A vacancy in an office which *happens* during a session of the Senate and remains unfilled until a recess of the Senate occurs, may be filled by the President during such recess by a temporary appointment. The rule is the

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[19] O'Shea *v.* United States (1893) (28 Ct. Cl. 392).

[20] President's Power to Fill Vacancies (1866) (12 Opinions of the Attorney General 32). See also President's Power to Appoint to Office (1865) (11 Opinions of the Attorney General 179).

same in the case of a new office which is not filled during the session in which it was created.[21]

The President has lawful power in the recess of the Senate to fill a vacancy on the bench of the Supreme Court, which vacancy existed during the last session of the Senate, by "granting a commission which shall expire at the end of their next session."

"If the question were new," says the Attorney General, "and now, for the first time, to be considered, I might have serious doubts of your constitutional power to fill up the vacancy, by temporary appointment, in the recess of the Senate. But the question is not new. It is settled in favor of the power, as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." [22]

The power to fill vacancies is not limited in its exercise to those which occur during the recess.

It was the intention of the Constitution that the offices created by law, and necessary to carry on the operations of the Government, should always be full, or, at all events, that the vacancy should not be a protracted one.[23]

Mr. Wirt in 1823, Mr. Taney in 1833, and Mr. Legare in 1841 concur in opinion—

that vacancies first occurring during the session of the Senate may be filled by the President in the recess.

Mr. Mason, in a short opinion given in 1845, held—

that vacancies known to exist during the session could not be filled in the recess.

In a more elaborate opinion written in 1846, however, he expresses general concurrence with his three predecessors.[24]

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[21] Vacancy in Office (1889) (19 Opinions of the Attorney General 261). See also In re Yancey (1886) (26 Fed. Rep. 445).

[22] President's Appointing Power (1862) (10 Opinions of the Attorney General, 356).

[23] Power of President to Fill Vacancies (1832) (2 Opinions of the Attorney General, 527).

[24] President's Power to Fill Vacancies in Recess of Senate (1866) (12 Opinions of the Attorney General, 33).

The President has power to fill, during a recess of the Senate, by temporary commission, a vacancy that occurred by expiration of commission during a previous session of that body.

If we interpret the word "happen" as being merely equivalent to "happen to exist" (as I think we may legitimately do), then all vacancies which, from any casualty, happen to exist at a time when the Senate can not be consulted as to filling them, may be temporarily filled by the President; and the whole purpose of the Constitution is completely accomplished.[25]

This constitutional provision is construed to comprehend all vacancies that may happen to exist in a recess of the Senate, and the President has authority to fill, during the recess, not only vacancies that have originated in the recess but also such as originated while the Senate was in session.[26]

The predicament of vacancy, which may be filled by a temporary appointment by the President, under the Constitution, is not confined by it to vacancies originating or beginning to exist during the recess of the Senate, but embraces all vacancies that from casualty happen to exist at a time when the Senate can not be consulted as to filling them.[27]

Where the President made a nomination for an office to the Senate, which the Senate failed to act upon before adjournment, it was held that a valid appointment was made when the President, during the recess of the Senate, issued a commission to the nominee, which he accepted.[28]

Where one has been appointed to a vacancy temporarily during the recess of the Senate and a commission

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[25] Executive Authority to Fill Vacancies (1823) (1 Opinions of the Attorney General, 631). See also Matter of Farrow (1880) (3 Fed. Rep. 115).

[26] Appointments During Recess of Senate (1880) (16 Opinions of the Attorney General, 522).

[27] Case of Collectorship of New Orleans (1868) (12 Opinions of the Attorney General, 449).

[28] Matter of Farrow (1880) (3 Fed. Rep. 112).

granted, no confirmation on the part of the Senate is necessary, and where the Senate fails to confirm the nomination for permanent appointment, a vacancy in that office will exist at the end of the following session. Another temporary appointment to the vacancy will then have to be made to fill the office.[29] But where an office to which an appointment was made was created by an act of Congress two years prior to the appointment, and there have been two sessions of Congress and the office had not previously been filled, it was held that there was no vacancy that happened during the recess of the Senate.[30]

The President can not appoint district judges, attorneys, and marshals during a recess of the Senate, for newly admitted States, where the offices were created and took effect during the session of that body. If vacancies are known to exist during the session of the Senate, and nominations are not then made to fill them, they can not be filled by the Executive during the subsequent recess.[31]

As to filling a vacancy during the adjournment of the Senate, it was held by the Attorney General that the recess of the Senate during which the President shall have power to fill a vacancy that may happen means the period after the final adjournment of Congress for the session and before the next session begins, while an adjournment during a session of Congress means a merely temporary suspension of business from day to day, or for such brief periods of time as are agreed upon by this joint action of the two Houses. The President is not authorized to appoint an officer during the current holiday adjournment of the Senate, which will have

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[29] Power of President to Appoint to Office During Recess of Senate (1846) (4 Opinions of the Attorney General, 523). See also Power of President to Fill Vacancies (1841) (3 Opinions of the Attorney General, 673).

[30] Schenck *v.* Peay (1869) (Fed. Cas. No. 12, 451).

[31] Appointing of Judges, etc., for Iowa and Florida (1845) (4 Opinions of the Attorney General, 361).

the effect of an appointment made in the recess occurring between two sessions of the Senate.[32]

Whenever the President issues a commission during the recess of the Senate, such commission continues until the end of the next session of Congress, unless sooner determined by the President, even though the person commissioned shall have been in the meantime nominated by the President to the office and his nomination rejected.[33] However, should the officer be later nominated and rejected, his commission is not thereby determined, nor his sureties released from liability, on account of any subsequent breach of his official bond, as the Constitution recognizes the validity of a commission to hold his office until the end of the next session unless it expires by death, resignation, or removal.[34]

Where an officer was appointed during the recess of the Senate, but unconfirmed at the next session, he has no title to the office subsequent to the adjournment. In view of the Constitution of the United States, the opinions of the Attorney General and statutes of the Supreme Court, as well as the practice of the Government, it can not be said that the principle of the common law that officers appointed for a term of years hold until their successors are appointed and qualified has been adopted as applicable to public officers of the United States.[35]

The acceptance of a new commission, after confirmation by the Senate of an appointment made during a recess, is

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[32] President—Appointment of Officers—Holiday Recess (1901) (23 Opinions of the Attorney General, 599).

[33] In re Marshalship, etc. (1884) (20 Fed. Rep. 382). See also Commissions Granted During Recess of Senate (1830) (2 Opinions of the Attorney General, 336).

[34] Tenure of Appointments Made During Recess of Senate (1842) (4 Opinions of the Attorney General, 30). See also Commissions Granted During Recess of Senate (1830) (2 Opinions of the Attorney General, 336).

[35] Romero *v.* United States (1889) (24 Ct. Cl. 337).

a virtual superseding and surrender of the commission granted on the original appointment.[36]

Every appointee assuming the official duties of any office under a commission issued by the President during a recess of the Senate does so with the likelihood or probability of serving without compensation, as section 1761 of the Revised Statutes provides that no money shall be paid from the Treasury, as salary, to any person appointed during a recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate.

The Attorney General, in passing an opinion on the act of February 9, 1863,[37] relative to the salary question, states:

> This legislation, in assuming to act upon the salary of officers appointed during the recess of the Senate, when the vacancies actually existed while the Senate was in session, must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution. In postponing the payment of the salary of the appointee until the Senate has given its assent to the appointment, it concedes the right of the President to appoint, although it undoubtedly embarrasses the exercise of that right by subjecting the appointee to conditions which are somewhat onerous.[38]

An office which has become vacant during a session of the Senate may be filled during the next ensuing recess of the Senate by a temporary appointment by the President,

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[36] Commissions Granted During Recess of Senate (1830) (2 Opinions of the Attorney General 336). See also United States *v.* Kirkpatrick (1824) (9 Wheat. 721).

[37] Ch. 25 (12 Stat. L. 646).

[38] Appointments During Recess of Senate (1880) (16 Opinions of the Attorney General, 522).

but payment of the salary of the appointee in such cases is postponed until he has been confirmed by the Senate.[39]

It must be confessed that the terms of the Constitution in reference to appointments have not been so clear and explicit as to leave their interpretation free from difficulty, and the difficulty has not been removed by any adjudication of the courts, or by any authority arising from the concurrence of those departments of Government whose powers are involved in the controversy.

Mr. Justice Miller has animadverted upon the practice of the President on some occasions in appointing in a subsequent recess one whom he had appointed in a previous one and whose nomination had been rejected at the intervening session of the Senate. The learned judge's criticism occurs in his lectures printed since his death, but in his criticism he does not deny the constitutional power of the President to fill the vacancy, but only its propriety.[40]

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[39] Salaries of Officers Appointed During Recess of Senate—When Vacancy Existed During Session of Senate—Temporary Appointment (1883) (17 Opinions of the Attorney General, 521).

[40] Miller on the Constitution of the United States, Lecture III.

APPENDIX A

Articles of Confederation, 1781–1788

Articles of Confederation and perpetual union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Article I. The style of this confederacy shall be "The United States of America."

Art. II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

Art. III. The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Art. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof, respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.

If any person guilty of, or charged with, treason, felony, or other high misdemeanor in any State shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor

or executive power of the State from which he fled, be delivered up, and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ART. V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two nor by more than seven members; and no person shall be capable of being a delegate for more than three years, in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in any meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the Members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on, Congress, except for treason, felony, or breach of the peace.

ART. VI. No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purpose for which the same is to be entered into and how long it shall continue.

No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance

of any treaties already proposed by Congress to the Courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such State or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of fieldpieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state, and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

ART. VII. When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the legislature of each State, respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ART. VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and

levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

ART. IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no Member of Congress shall be appointed as judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other States in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they can not agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without

showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants, are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States, fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldierlike manner at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number can not be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped shall march to the place appointed and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the Army or Navy, unless nine States assent to the same, nor shall a question on any

other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

ART. X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine States, in the Congress of the United States assembled, is requisite.

ART. XI. Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same unless such admission be agreed to by nine States.

ART. XII. All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII. Every State shall abide by the determination of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress to approve of, and to authorize us to ratify the said

Articles of Confederation and perpetual Union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord, 1778, and in the third year of the independence of America.

(These articles were not ratified by all the States until 1st March, 1781, when the delegates of Maryland, the latest in ratifying, signed for her.)

APPENDIX B

The Virginia Plan

1. *Resolved,* That the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, common defence, security of liberty, and general warfare.

2. *Resolved, therefore,* That the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. *Resolved,* That the National Legislature ought to consist of two branches.

4. *Resolved,* That the members of the first branch of the National Legislature ought to be elected by the people of the several States every ..... for the term of .....; to be of the age of ..... years at least; to receive liberal stipends by which they may be compensated for the devotion of their time to the public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of ..... after its expiration; to be incapable of reelection for the space of ..... after the expiration of their term of service, and be subject to recall.

5. *Resolved,* That the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures, to be of the age of ..... years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipend, by which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service; and for the space of ..... after the expiration thereof.

6. *Resolved,* That each branch ought to possess the right of originating acts; that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation,

and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the articles thereof.

7. *Resolved,* That a National Executive be instituted; to be chosen by the National Legislature for the term of .....; to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase nor diminution shall be made, so as to effect the magistracy existing at the time of increase or diminution; and to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

8. *Resolved,* That the Executive and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the National Legislature, before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular legislature be again negatived by ..... of the members of each branch.

9. *Resolved,* That a national judiciary be established, to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the same time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas, captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdiction, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.

10. *Resolved,* That provisions ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

11. *Resolved,* That a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State.

12. *Resolved,* That provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements.

13. *Resolved,* That provision ought to be had for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not be required thereto.

14. *Resolved,* That the legislative, executive, and judiciary powers within the several States ought to be bound by oath to support the Articles of Union.

15. *Resolved,* That the amendment which shall be offered to the Confederation, by the convention, ought at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the people to consider and decide thereon.

APPENDIX C

The New Jersey Plan

1. *Resolved,* That the Articles of Confederation ought to so be revised, corrected, and enlarged as to render the Federal Constitution adequate to the exigencies of government and the preservation of the Union.

2. *Resolved,* That in addition to the powers vested in the United States in Congress by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying of duties on all goods or merchandise of foreign growth or manufacture imported into any part of the United States, by stamps on paper, vellum, or parchment, and by a postage on all letters or packages passing through the general post office, to be applied to such Federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same, from time to time, alter and amend in such manner as they shall think proper; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other: *Provided,* that all punishments, fines, forfeitures, and penalties to be incurred for contravening such acts, rules, and regulations shall be adjudged by the common-law judiciaries of the State in which any offence contrary to the true intent and meaning of such acts, rules, and regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the superior common-law judiciary in such State; subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment, to an appeal to the judiciary of the United States.

3. *Resolved,* That whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the Articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with in the time specified therein, to direct the collection thereof in the noncomplying States; and for that

purpose to devise and pass acts directing and authorizing the same: *Provided,* That none of the powers hereby vested in the United States in Congress shall be exercised without the consent of at least ..... States; and in that proportion, if the number of confederated States should hereafter be increased or diminished.

4. *Resolved,* That the United States in Congress be authorized to elect a Federal Executive, to consist of ..... persons, to continue in office for the term of ..... years; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution; to be paid out of the Federal Treasury, to be incapable of holding any other office or appointment during their time of service, and for ..... years thereafter; to be ineligible a second time, and removable by Congress, on application by a majority of the executives of the several States; that the Executive, besides their general authority to execute the Federal acts, ought to appoint all Federal officers not otherwise provided for, and to direct all military operations: *Provided,* That none of the persons composing the Federal Executive shall, on any occasion, take command of any troops so as personally to conduct any military enterprise, as General or in any other capacity.

5. *Resolved,* That a Federal Judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the Executive, and to hold offices during good behavior; to receive punctually, at stated times, a fixed compensation for the services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary so establised shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and by way of appeal, in the dernier resort, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue; that none of the judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for ..... thereafter.

6. *Resolved,* That all acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties, made and ratified under the authority of the United States, shall be the supreme law

of the respective States, so far forth as those acts and treaties shall relate to the said States or their citizens; and that the judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding; and that if any State, or any body of men in any State, shall oppose or prevent the carrying into execution such acts or treaties, the Federal Executive shall be authorized to call forth the power of the Confederated States, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

7. *Resolved,* That provision be made for the admission of new States into the Union.

8. *Resolved,* That the rule for naturalization ought to be the same in every State.

9. *Resolved,* That a citizen of one State committing an offence in another State of the Union shall be deemed guilty of the same offence as if it had been committed by a citizen of the State in which the offence was committed.

APPENDIX D

Alexander Hamilton's Plan

I. The supreme legislative power of the United States of America to be vested in two different bodies of men, the one to be called the Assembly, the other the Senate, who together shall form the Legislature of the United States, with power to pass all laws whatsoever, subject to the negative hereafter mentioned.

II. The Assembly to consist of persons elected by the people to serve for three years.

III. The Senate to consist of persons elected to serve during good behaviour, their election to be made by electors chosen for that purpose by the people. In order to do this, the States to be divided into election districts. On the death, removal, or resignation of any Senator, his place to be filled out of the district from which he came.

IV. The supreme Executive authority of the United States to be vested in a Governor, to be elected to serve during good behaviour; the election to be made by electors chosen by the people in the election districts aforesaid. The authorities and functions of the Executive to be as follows: To have a negative on all laws about to be passed and the execution of all laws passed; to have the direction of war when authorized or begun; to have, with the advice and approbation of the Senate, the power of making all treaties; to have the sole appointment of the heads or chief officers of the Departments of Finance, War, and Foreign Affairs; to have the nomination of all other officers (ambassadors to foreign nations included) subject to the approbation or rejection of the Senate; to have the power of pardoning all offences except treason, which he shall not pardon without the approbation of the Senate.

V. On the death, resignation, or removal of the Governor, his authorities to be exercised by the President of the Senate till a successor be appointed.

VI. The Senate to have the sole power of declaring war, the power of advising and approving all treaties, the power of approving or rejecting all appointments of officers, except the heads or chiefs of the Departments of Finance, War, and Foreign Affairs.

VII. The supreme judicial authority to be vested in judges, to hold their offices during good behaviour, with adequate and permanent sal-

aries. This court to have original jurisdiction in all causes of capture, and an appellative jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations, are concerned.

VIII. The Legislature of the United States to have power to institute courts in each State for the determination of all matters of general concern.

IX. The Governor, Senators, and all officers of the United States to be liable to impeachment for mal and corrupt conduct, and upon conviction to be removed from office and disqualified for holding any place of trust or profit; all impeachments to be tried by a court to consist of the Chief ..... or judge of the superior court of law of each State, provided such judge shall hold his place during good behaviour and have a permanent salary.

X. All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is the Governor or President.

XI. No State to have any forces, land or naval; and the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them.

APPENDIX E

Charles Pinckney's Plan

We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the government of ourselves and posterity

Article I. The style of this government shall be The United States of America, and the government shall consist of supreme legislative, executive, and judicial powers.

Art. II. The legislative power shall be vested in a Congress, to consist of two separate Houses, one to be called the House of Delegates and the other the Senate, who shall meet on the ..... day of ..... in every year.

Art. III. The members of the House of Delegates shall be choosen every ..... year by the people of the several States, and the qualification of the electors shall be the same as those of the electors in the several States for their legislatures. Each member shall have been a citizen of the United States for ..... years, and shall be of ..... years of age and a resident in the State he is chosen for. Until a census of the people shall be taken in the manner hereinafter mentioned, the House of Delegates shall consist of ..... to be chosen from the different States in the following proportions: For New Hampshire, ...; for Massachusetts, ...; for Rhode Island, ...; for Connecticut, ...; for New York, ...; for New Jersey, ...; for Pennsylvania, ...; for Delaware, ...; for Maryland, ...; for Virginia, ...; for North Carolina, ...; for South Carolina, ...; for Georgia, ...; and the Legislature shall hereinafter regulate the number of Delegates by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every ..... thousand. All money bills of every kind shall originate in the House of Delegates, and shall not be altered by the Senate. The House of Delegates shall exclusively possess the power of impeachment, and

shall choose its own officers; and vacancies therein shall be supplied by the executive authority of the State in the representation from which they shall happen.

ART. IV. The Senate shall be elected and chosen by the House of Delegates; which House, immediately after their meeting, shall choose by ballot ..... Senators from among the citizens and residents of New Hampshire, ... from among those of Massachusetts, ... from among those of Rhode Island, ... from among those of Connecticut, ... from among those of New York, ... from among those of New Jersey, ... from among those of Pennsylvania, ... from among those of Delaware, ... from among those of Maryland, ... from among those of Virginia, ... from among those of North Carolina, ... from among those of South Carolina, and ..... from among those of Georgia. The Senators chosen from New Hampshire, Massachusetts, Rhode Island, and Connecticut shall form one class; those from New York, New Jersey, Pennsylvania, and Delaware, one class; and those from Maryland, Virginia, North Carolina, South Carolina, and Georgia, one class. The House of Delegates shall number these classes one, two, and three, and fix the times of their service by lot. The first class shall serve for ..... years, the second for ..... years, and the third for ..... years. As their times of service expire, the House of Delegates shall fill them up by elections for ..... years; and they shall fill all vacancies that arise from death or resignation, for the time of service remaining of the members so dying or resigning. Each Senator shall be ..... years of age at least, and shall have been a citizen of the United States for four years before his election; and shall be a resident of the State he is chosen from. The Senate shall choose its own officers.

ART. V. Each State shall prescribe the time and manner of holding elections by the people for the House of Delegates; and the House of Delegates shall be the judges of the elections, returns, and qualifications of their members.

In each House a majority shall constitute a quorum to do business. Freedom of speech and debate in the Legislature shall not be impeached or questioned in any place out of it; and the members of both Houses shall in all cases, except for treason, felony, or breach of the peace, be free from arrest during their attendance on Congress and in going to and returning from it. Both Houses shall keep Journals of their proceedings and publish them, except on secret occasions; and the yeas and nays may be entered thereon at the desire of one ..... of the members present. Neither House, without the consent of the other, shall adjourn for more than ..... days, nor to any place but where they are sitting.

The members of each House shall not be eligible to, or capable of holding, any office under the Union, during the time for which they have been respectively elected; nor the members of the Senate for one year after. The members of each House shall be paid for their services by the States which they represent. Every bill which shall have passed the Legislature shall be presented to the President of the United States for his revision; if he approves it, he shall sign it; but if he does not approve it, he shall return it, with his objections, to the House it originated in; which House, if two-thirds of the members present, notwithstanding the President's objections, agree to pass it, shall send it to the other House, with the President's objections; where if two-thirds of the members present also agree to pass it, the same shall become a law; and all bills sent to the President, and not returned by him within ..... days, shall be laws, unless the Legislature, by their adjournment, prevent their return; in which case they shall not be laws.

ART. VI. The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

To regulate commerce with all nations, and among the several States;

To borrow money and emit bills of credit;

To establish post offices;

To raise armies;

To build and equip fleets;

To pass laws for arming, organizing, and disciplining the militia of the United States;

To subdue a rebellion in any State on application of its Legislature;

To coin money, and regulate the value of all coins, and fix the standard of weights and measures;

To provide such dockyards and arsenals, and erect such fortifications as may be necessary for the United States, and to exercise exclusive jurisdiction therein;

To appoint a Treasurer, by ballot;

To constitute tribunals inferior to the Supreme Court;

To establish post and military roads;

To establish and provide for a national university at the seat of government of the United States;

To establish uniform rules of naturalization;

To provide for the establishment of a seat of government for the United States, not exceeding ..... miles square, in which they shall have exclusive jurisdiction;

To make rules concerning captures from an enemy;

To declare the law and punishment of piracies and felonies at sea, and of counterfeiting coin, and of all offences against the laws of nations;

To call forth the aid of the militia to execute the laws of the United States, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws for carrying the foregoing powers into execution.

The Legislature of the United States shall have the power to declare the punishment of treason, which shall consist only in levying war against the United States, or any of them, or in adhering to their enemies. No person shall be convicted of treason but by the testimony of two witnesses.

The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description; which number shall, within ..... years after the first meeting of the Legislature, and within the term of every ..... years after, be taken in the manner to be prescribed by the Legislature.

No tax shall be laid on articles exported from the States; nor capitation tax, but in proportion to the census before directed.

All laws regulating commerce shall require the assent of two-thirds of the members present in each House. The United States shall not grant any title of nobility. The Legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press, nor shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion.

All acts made by the Legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.

ART. VII. The Senate shall have the sole and exclusive power to declare war, and to make treaties, and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court.

They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now existing, or which may arise, between the States respecting jurisdiction or territory.

ART. VIII. The executive power of the United States shall be vested in a President of the United States of America, which shall be his style; and his title shall be His Excellency. He shall be elected for ..... years, and shall be re-eligible.

He shall from time to time give information to the Legislature of the state of the Union and recommend to their consideration the measures he may think necessary. He shall take care that the laws

of the United States be duly executed. He shall commission all the officers of the United States; and, except as to ambassadors, other ministers, and judges of the Supreme Court, he shall nominate, and, with the consent of the Senate, appoint all other officers of the United States. He shall receive public ministers from foreign nations; and may correspond with the executives of the different States. He shall have power to grant pardons and reprieves, except in impeachments. He shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States, and shall receive a compensation which shall not be increased or diminished during his continuance in office. At entering on the duties of his office, he shall take an oath faithfully to execute the duties of a President of the United States. He shall be removed from his office on impeachment by the House of Delegates and conviction in the Supreme Court of treason, bribery, or corruption. In case of his removal, death, resignation, or disability, the President of the Senate shall exercise the duties of his office until another President be chosen. And in case of the death of the President of the Senate, the Speaker of the House of Delegates shall do so.

Art. IX. The Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty as shall be necessary.

The judges of the courts shall hold their offices during good behaviour and receive a compensation which shall not be increased or diminished during their continuance in office. One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States or affecting ambassadors, other public ministers, and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors and other public ministers this jurisdiction shall be original, and in all other cases appellate.

All criminal offences, except in cases of impeachment shall be tried in the State where they shall be committed. The trials shall be open and public and shall be by jury.

Art. X. Immediately after the first census of the people of the United States, the House of Delegates shall apportion the Senate by electing for each State, out of the citizens resident therein, one Senator for every ..... members each State shall have in the House of Delegates. Each State shall be entitled to have at least one member in the Senate.

Art. XI. No State shall grant letters of marque and reprisal, or enter into treaty, or alliance, or confederation; nor grant any title of nobility; nor, without the consent of the Legislature of the United

States, lay any impost on imports; nor keep troops or ships of war in time of peace; nor enter into compacts with other States or foreign powers; nor emit bills or credit; nor make any thing but gold, silver, or copper, a tender in payment of debts; nor engage in war, except for self-defense when actually invaded, or the danger of invasion be so great as not to admit of a delay until the Government of the United States can be informed thereof. And to render these prohibitions effectual, the Legislature of the United States shall have power to revise the laws of the several States that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress, and to negative and annul such as do.

ART. XII. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Any person, charged with crimes in any State fleeing from justice to another, shall, on demand of the executive of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.

ART. XIII. Full faith shall be given each State to the acts of the Legislature, and to the records and judicial proceedings of the courts and magistrates of every State.

The Legislature shall have power to admit new States into the Union on the same terms with the original States, provided two-thirds of the members present in both Houses agree.

ART. XV. On the application of the Legislature of a State, the United States shall protect it against domestic insurrection.

ART. XVI. If two-thirds of the legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.

The ratification of the ..... convention of ..... States shall be sufficient for organizing this Constitution.

APPENDIX F

An Act Regulating the Tenure of Certain Civil Offices, March 2, 1867

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office and shall become duly qualified to act therein, is, and shall be, entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided:

Provided, That the Secretary of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices, respectively, for and during the term of the President by whom they may have been appointed and for one month thereafter, subject to removal by and with the advice and consent of the Senate.

Sec. 2. *And be it further enacted,* That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the Prsident may suspend such officer and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate, and such person so designated shall take the oaths and give the bonds required by law to be taken and given by the person duly appointed to fill such office, and in such case it shall be the duty of the President, within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person so designated to perform the duties of such office. And if the Senate shall concur in such suspension and advise and consent to the removal of such officer, they shall so certify to the President, who may thereupon remove such officer, and, by and with the advice and consent of the Senate, appoint another person to such office. But if the Senate shall refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of his office,

and the powers of the person so performing its duties in his stead shall cease, and the official salary and emoluments of such officer shall, during such suspension, belong to the person so performing the duties thereof, and not to the officer so suspended: *Provided, however,* That the President, in case he shall become satisfied that such suspension was made on insufficient grounds, shall be authorized, at any time before reporting such suspension to the Senate as above provided, to revoke such suspension and reinstate such officer in the performance of the duties of his office.

SEC. 3. *And be it further enacted,* That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant, or temporarily filled as aforesaid during such next session of the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

SEC. 4. *And be it further enacted,* That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law.

SEC. 5. *And be it further enacted,* That if any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, to or authorized to act in or holding or exercising the duties or functions of any office contrary to the provisions of this act, nor shall any claim, account, voucher, order, certificate, warrant, or other instrument providing for or relating to such payment, receipt, or retention, be presented, passed, allowed, approved, certified, or paid by any officer of the United States, or by any person exercising the functions or performing the duties of any office or place of trust under the United States for or in respect to such office, or the exercising or performing the functions or duties thereof; and every person who shall violate any of the provisions of this section shall be deemed guilty of a high misdemeanor, and, upon trial and conviction thereof, shall be punished therefor by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both said punishments, in the discretion of the court.[1]

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[1] United States Statutes at Large (39th Cong., 1865–1867, vol. 14, pp. 430–432).

APPENDIX G

Appointment of Principal Officers in Executive Departments

A. Presidential appointments requiring confirmation by Senate

Officer	Term	Citation
STATE DEPARTMENT		
Secretary of State	Not specified	R. S. 199.
Assistant Secretaries	do	R. S. 200. 18 Stat. 90; June 20, 1874.
Counselor	do	37 Stat. 372; Aug. 23, 1912.
WAR DEPARTMENT		
Secretary of War	Not specified	R. S. 214.
Assistant Secretary	do	26 Stat. 17; Mar. 5, 1890.
Chief of Bureau of Insular Affairs	Four years	34 Stat. 456; June 25, 1906.
TREASURY DEPARTMENT		
Secretary of the Treasury	Not specified	R. S. 233.
Assistant Secretaries	do	R. S. 234. 26 Stat. 236; July 11, 1890.
Comptroller of the Currency	Five years	R. S. 325.
Treasurer of the United States	Not specified	R. S. 301.
Commissioner of Internal Revenue.	do	R. S. 319.
Director of the Mint	Five years	R. S. 343.
Comptroller of the Treasury [1]	Not specified	R. S. 268.
Auditors	do	R. S. 276.
Register of the Treasury	do	R. S. 321.
Surgeon General, Public Health Service.[2]	do	18 Stat. 377; Mar. 3, 1875.
Captain commandant of Coast Guard.	Four years	35 Stat. 61; Apr. 16, 1908.
POST OFFICE DEPARTMENT		
Postmaster General	Term of appointing President and one month thereafter.	R. S. 388.
Assistant Postmasters General	Not specified	R. S. 389.

[1] Title changed from First Comptroller by act of July 31, 1894 (26 Stat. 205, sec. 4).
[2] Title changed from Supervising Surgeon General by act of July 1, 1902 (32 Stat. 712, sec. 1).

A. Presidential appointments requiring confirmation by Senate—Con.

Officer	Term	Citation
DEPARTMENT OF JUSTICE		
Attorney General	Not specified	R. S. 346.
Solicitor General	do	R. S. 347.
Assistant to the Attorney General	do	32 Stat. 1062; Mar. 3, 1903.
Assistant Attorneys General	do	R. S. 348; 26 Stat. 265; July 11, 1890; 32 Stat. 1062; Mar. 3, 1903; 36 Stat. 108, sec. 28; Aug. 5, 1909.
Solicitor for the State Department.[3]	do	R. S. 349.
Solicitor of the Treasury	do	Do.
Solicitor of Internal Revenue	do	Do.
Solicitor of the Department of Commerce.	do	33 Stat. 135; Mar. 18, 1904.
NAVY DEPARTMENT		
Secretary of the Navy	Not specified	R. S. 415.
Assistant Secretary	do	26 Stat. 254; July 11, 1890.
Chief of Naval Operations	Four years	38 Stat. 929; Mar. 3, 1915.
Chiefs of bureaus	do	R. S. 421.
Judge Advocate General	do	21 Stat. 164; June 8, 1880.
INTERIOR DEPARTMENT		
Secretary of the Interior	Not specified	R. S. 437.
First Assistant Secretary	do	23 Stat. 497; Mar. 3, 1885.
Assistant Secretary	do	R. S. 438.
Commissioner of General Land Office.	do	R. S. 446.
Commissioner of Indian Affairs	do	R. S. 462.
Commissioner of Pensions	do	R. S. 470.
Commissioner of Patents	do	39 Stat. 8; Feb. 15, 1916.
Commissioner of Education	do	R. S. 517.
Director of Geological Survey	do	20 Stat. 394; Mar. 3, 1879.
Director of Bureau of Mines	do	37 Stat. 681, sec. 1; Feb. 25, 1913.
DEPARTMENT OF AGRICULTURE		
Secretary of Agriculture	Not specified	25 Stat. 659, sec. 1; Feb. 9, 1889.
Assistant Secretary	do	25 Stat. 659, sec. 2; Feb. 9, 1889.
Chief of Weather Bureau	do	26 Stat. 653, sec. 4; Oct. 1, 1890.
DEPARTMENT OF COMMERCE		
Secretary of Commerce	Same as heads of other departments.	32 Stat. 825; Feb. 14, 1903.
Assistant Secretary	Not specified	32 Stat. 826, sec. 2; Feb. 14, 1903.
Director of the Census	do	32 Stat. 51, sec. 3; Mar. 3, 1902.
Director of Bureau of Standards	do	31 Stat. 1449, sec. 5; Mar. 3, 1901.
Commissioner of Fish and Fisheries.	do	25 Stat. 1; Jan. 20, 1888.

[3] Title changed from Examiner of Claims by act of Mar. 3, 1891 (26 Stat. 945).

A. Presidential appointments requiring confirmation by Senate—Con.

Officer	Term	Citation
DEPARTMENT OF COMMERCE—con.		
Superintendent of Coast and Geodetic Survey.	Not specified	25 Stat. 949; Mar. 2, 1889.
Commissioner of Navigation	do	23 Stat. 119, sec. 6; July 5, 1884.
Supervising Inspector General Steamboat Inspection Service.	do	R. S. 4402.
DEPARTMENT OF LABOR		
Secretary of Labor	Same as head of other departments.	37 Stat. 736, sec. 1; Mar. 4, 1913.
Commissioner-General of Immigration.[4]	Not specified	26 Stat. 1085, sec. 7; Mar. 3, 1891.
Commissioner of Labor Statistics.[5]	Four years	25 Stat. 182, sec. 2; June 13, 1888.
Chief of Children's Bureau	Not specified	37 Stat. 79, sec. 2; Apr. 9, 1912.

B. Presidential appointments not requiring confirmation by Senate

Officer	Term	Citation
Commissioner of Light Houses	Not specified	36 Stat. 537, sec. 4; June 17, 1910.
International Joint Commission	do	32 Stat. 373, sec. 4; June 13, 1902.

[4] Title changed from Superintendent of Immigration by act of Mar. 2, 1895 (28 Stat. 780).
[5] Title changed from Commissioner of Labor by act of Mar. 4, 1913 (37 Stat. 737, sec. 3).

A compilation of statutes which provide for appointments by the President either alone or by and with the advice and consent of the Senate but which restrict the President in his exercise of the power to appoint or remove the appointee:

C. Statutes imposing restrictions on appointments

A. RESIDENCE AND CITIZENSHIP REQUIREMENTS

(*a*) General statutes:
Consular clerks (sec. 1704 R. S.).
Federal Board for Vocational Education, appointed members (39 Stat. 932, sec. 6).
Federal Farm Loan Board, members (42 Stat. 1473, sec. 301).
Foreign Service officers (43 Stat. 141, sec. 5).
Postmasters (33 Stat. 441, sec. 8).

(*b*) Statutes applicable solely to a Territory or possession or to the District of Columbia:

Circuit courts of Hawaii, judges (31 Stat. 157, sec. 80, Am. 42 Stat. 119).

District courts for Hawaii, district attorney (42 Stat. 120, sec. 86 (b)).

District courts for Hawaii, judge (42 Stat. 120, sec. 86 (b)).

District court for Hawaii, marshal (42 Stat. 120, sec. 86 (b)).

District court of the Virgin Islands, judges (32 Stat. 1132, Am. 42 Stat. 123).

District of Columbia, civil commissioners (20 Stat. 103, sec. 2).

Municipal Court of the District of Columbia, judges (35 Stat. 623).

Police Court of the District of Columbia, judges (Pub. No. 561, 68th Cong., sec. 3 (a)).

Supreme Court of Hawaii, judges (31 Stat. 157, sec. 80, Am. 42 Stat. 119).

(*c*) Statutes applicable solely to the Army or Navy:

Army Reserve Corps, officers (41 Stat. 775, sec. 32).

Naval Reserve Force, officers (39 Stat. 587).

B. POLITICAL AFFILIATIONS

(*a*) General statutes:

Board of General Appraisers (42 Stat. 972, sec. 518).

Civil Service Commission, commissioners (22 Stat. 403).

Federal Farm Loan Board, members (42 Stat. 1473, sec. 301).

Federal Trade Commission, commissioners (38 Stat. 718, sec. 1).

Interstate Commerce Commission, commissioners (41 Stat. 497, sec. 440).

United States Shipping Board, commissioners (41 Stat. 989, sec. 3 (a)).

United States Tariff Commission, commissioners (39 Stat. 795, sec. 700).

C. INDUSTRIAL, GEOGRAPHICAL, OR GOVERNMENTAL REPRESENTATION

(*a*) General statutes:

Advisory Committee for Aeronautics, members (38 Stat. 930).

Aircraft Board, Military and Naval, members (40 Stat. 296).

Bureau of Fisheries, commissioner (16 Stat. 594, sec. 1).

Capital Issues Committee, members (40 Stat. 512, sec. 200).

Consular Service, inspectors of consulates (34 Stat. 100, sec. 4).

Federal Board for Vocational Education, appointed members (39 Stat. 932, sec. 6).

(*a*) General statutes—Continued.
Federal Reserve Board, appointed members (42 Stat. 620).
Internal-revenue collectors (sec. 3142, R. S.).
Mississippi River Commission, commissioners (21 Stat. 37, sec. 2).
Railroad Labor Board, members (41 Stat. 470, sec. 304).
United States Shipping Board, commissioners (41 Stat. 989, sec. 3 (a)).

(*b*) Statutes applicable solely to a Territory or possession or to the District of Columbia:
Rent Commission of the District of Columbia, commissioners (42 Stat. 544, sec. 4).
Isthmian Canal Commission, members (32 Stat. 483, sec. 7).
Municipal Court of the District of Columbia, judges (35 Stat. 623).
Police Court of the District of Columbia, judges (Pub. No. 561, 68th Cong., sec 3 (a).
Territorial district attorneys (sec. 1875, R. S.)
United States Court for China, district attorney (34 Stat. 816, sec. 6).
United States Court for China, judges (34 Stat. 816, sec. 6).

D. PROFESSIONAL ABILITY

(*a*) General statutes:
Advisory Committe for Aeronautics, members (38 Stat. 930).
Bureau of Fisheries, commissioner (16 Stat. 594, sec. 1).
Bureau of Mines, director (37 Stat. 681, sec. 1).
California Débris Commission, members (27 Stat. 507).
Consular Service, inspector of consulates (34 Stat. 100, sec. 4).
Mississippi River Commission, commissioners (21 Stat. 37, sec. 2).
Patent Office, examiners in chief (sec. 482, R. S.).
Public Printer (14 Stat. 398, Am. 18 Stat. 88).
Rio Grande Commission, commissioners (43 Stat. 118).
Solicitor General (sec. 347, R. S.).
Steamboat Inspection Service, supervising inspectors (sec. 4404 R. S., Am. 40 Stat. 740).
Superintendent of Indian schools (25 Stat. 1003, sec. 10).
United States district attorneys (sec. 767, R. S.).

(*b*) Statutes applicable solely to the Army and Navy:
Department of the Navy, Chief of the Bureau of Economics (42 Stat. 140, sec. 8).
Department of the Navy, chiefs of bureaus (secs. 421–426, R. S.).
Marine Corps, Major General Commandant (30 Stat. 609).
National Guard, officers (on Federal service) (41 Stat. 784, sec. 49).

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(*b*) Statutes applicable solely to the Army and Navy—Continued.
Navy, Judge Advocate General (21 Stat. 164).
Officers' Reserve Corps, Army (41 Stat. 775, sec. 32).
Regular Army, officers (41 Stat. 771, sec. 24).

E. FITNESS TO PERFORM DUTIES OF OFFICE

Board of Tax Appeals, members (43 Stat. 336, sec. 900 (b)).
Steamboat Inspection Service, Supervising Inspector General (40 Stat. 739).
Interstate Commerce Commission, chief and assistant chief inspectors of locomotive boilers (36 Stat. 913, sec. 3).
United States Shipping Board, commissioners (41 Stat. 989).

F. SUCCESSFUL COMPLETION OF EXAMINATION OR PERIOD OF PROBATION

Civil service appointees (22 Stat. 403).
Consular clerks (sec. 1705 R. S.).
Foreign Service officers (43 Stat. 141, sec. 5).

G. SELECTION FROM LIMITED NUMBER OF NOMINEES

Civil service appointees (22 Stat. 403).
Railroad Labor Board (41 Stat. 470, secs. 304, 305).

D. Statutes imposing restrictions on removals

A. DENIAL TO THE PRESIDENT OF ALL POWER TO REMOVE

(*a*) General statutes:
Comptroller General of the United States (42 Stat. 23, 24).
Appointed by President with consent of Senate.
Term of office: Fifteen years.
Removable by joint resolution of Congress.
Restriction on removal: "After notice and hearing . . . when . . . permanently incapacitated or . . . inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment."
Court of Claims, judges (40 Stat. 1157, sec. 4).
Appointed by President with consent of Senate.
Term of office: None specified.
Removal: None specified.
Restriction on removal: "Hold their offices during good behavior."

(*b*) Statutes relating exclusively to the District of Columbia:

Court of Appeals of the District of Columbia, justices (31 Stat. 1224).

Appointed by President with consent of Senate.

Term of office: None specified.

Removal: None specified.

Restriction on removal: "Hold their offices during good behavior."

Municipal Court of the District of Columbia, judges (35 Stat. 623; 41 Stat. 555, 556, sec. 65; 41 Stat. 1312, 1313, sec. 13).

Appointed by President with consent of Senate.

Term of office: Four years and until successor is qualified.

Removable by Supreme Court of the District of Columbia.

Restriction upon removal: "May hear charges . . . and remove . . . from office for cause shown."

Supreme Court of the District of Columbia, judges (31 Stat. 1199, sec. 60).

Appointed by President with consent of Senate.

Term of office: None specified.

Removal: None specified.

Restriction on removal: "Holding their offices during good behavior."

B. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE EXCEPT WITH THE CONSENT OF THE SENATE

Postmaster General (sec. 388 R. S.).

Appointed by President with consent of Senate.

Term of office: "During term of the President by whom he is appointed, and for one month thereafter."

Removable by President with consent of Senate.

Restriction on removal: None except that consent of Senate must be obtained.

First, Second, and Third Assistant Postmasters General (sec. 389 R. S.).

Appointed by President with consent of Senate.

Term of office: None specified.

Removable by President with consent of Senate.

Restrictions on removal: None except that consent of Senate must be obtained.

Postmasters of the first, second, and third classes (sec. 3830, R. S.; 19 Stat. 80, 81, sec. 6).

Appointed by President with consent of Senate.

Term of office: Four years.

Postmasters of the first, second, and third classes—Continued.
Removable by President with consent of Senate.
Restrictions on removal: None except that consent of Senate must be obtained.

C. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE FOR ANY CAUSE OTHER THAN CERTAIN SPECIFIED CAUSES

(*a*) General statutes:

Board of General Appraisers, members (42 Stat. 972, sec. 518).
Appointed by President with consent of Senate.
Term of office: None specified.
Removable by President alone.
Restriction on removal: "Hold office during good behavior, but may, after hearing, be removed . . . for the following causes and no other: Neglect of duty, malfeasance in office, or inefficiency."

Board of Tax Appeals, members (43 Stat. 336, 337, sec. 900).
Appointed by President with consent of Senate.
Term of office: Ten years and until successor is qualified.
Removable by President alone.
Restriction on removal: "Inefficiency, neglect of duty, or malfeasance in office, but for no other reason."

Railroad Labor Board, members (41 Stat. 470, secs. 306, 307).
Appointed by President with consent of Senate.
Term of office: Five years.
Removable by President alone.
Restriction on removal: "Neglect of duty or malfeasance in office, but for no other cause."

(*b*) Statutes relating exclusively to Army and Navy:

Army, commissioned officers (sec. 1229, R. S.; 36 Stat. 894, ch. 22; 41 Stat. 811, art. 118).
Appointment: None specified in statutes cited, which relate to removal only. Appointments in Regular Army are made by President with consent of Senate. In Reserve Corps and branches of the service other than the Regular Army, appointments are usually required to be made by the President alone, except that general officers are appointed by the President with the consent of the Senate.
Term: None usually specified.
Removable by President or by general courts-martial.

(*b*) Statutes relating exclusively to Army and Navy—Continued.

Army, commissioned officers—Continued.

Restriction on removal: In war time, no restriction on President; in time of peace, President may at any time drop from the rolls any officer absent from duty three months without leave or absent in confinement in a prison or penitentiary for three months after final conviction.

Navy, commissioned officers (secs. 1229 and 1624, art. 36, R. S.).

Appointment: None specified in statutes cited, which relate to removal only. Appointments in Navy are usually required to be made by President with consent of Senate.

Term of office: None usually specified.

Removable by President or general courts-martial.

Restriction on removal: In time of peace only by sentence of general courts-martial.

D. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE FOR CERTAIN CAUSES EXCEPT AFTER NOTICE AND OPPORTUNITY TO DEFEND

(*a*) General statutes:

Consular clerks (secs. 1704, 1705, R. S.).

Appointed by President.

Term of office: None specified.

Removal authority not specified.

Restriction on removal: "For cause . . . submitted to Congress at session first following such removal."

Federal Farm Loan Board, members (39 Stat. 360, sec. 3, Am. 42 Stat. 1473, sec. 301).

Appointed by President with consent of Senate.

Term of office: Eight years.

Removable by President alone.

Restriction on removal: "For cause."

Federal Reserve Board, members (except ex officio) (42 Stat. 620, sec. 10).

Appointed by President with consent of Senate.

Term of office: Ten years.

Removable by President alone.

Restriction on removal: "For cause."

Federal Trade Commission, Commissioners (38 Stat. 717, 718).

Appointed by President with consent of Senate.

Term of office: Seven years.

Removable by President alone.

Restriction upon removal: "Inefficiency, neglect of duty, or malfeasance in office."

(*a*) General statutes—Continued.

Interstate Commerce Commission, Commissioners (24 Stat. 383, sec. 11, Am. 41 Stat. 497, sec. 440).
- Appointed by President with consent of Senate.
- Term of office: Seven years.
- Removable by President.
- Restriction on removal: "For inefficiency, neglect of duty, or malfeasance in office."

United States Tariff Commission commissioners (39 Stat. 795, sec. 700).
- Appointed by President with consent of Senate.
- Term of office: Twelve years.
- Removable by President alone.
- Restriction upon removal: "Inefficiency, neglect of duty, or malfeasance in office."

United States Shipping Board commissioners (41 Stat. 989, sec. 3).
- Appointed by President with consent of Senate.
- Term of office: Six years.
- Removable by President alone.
- Restriction upon removal: "Inefficiency, neglect of duty, or malfeasance in office."

(*b*) Statutes relating exclusively to a Territory or to the District of Columbia:

District Court for Alaska, judges (23 Stat. 24, Am. 31 Stat. 325, sec. 10).
- Appointed by President with consent of Senate.
- Term of office: Four years and until successor is qualified.
- Removable by President alone.
- Restriction on removal: "For cause."

District Court for Alaska, marshal (23 Stat. 24, Am. 31 Stat. 325, sec. 10).
- Appointed by President with consent of Senate.
- Term of office: Four years and until successor is qualified.
- Removable by President alone.
- Restriction on removal: "For cause."

Juvenile Court of the District of Columbia, judge (34 Stat. 73, sec. 2).
- Appointed by President with consent of Senate.
- Term of office: Six years.
- Removable by President alone.
- Restriction on removal: "For cause."

(*b*) Statutes relating exclusively to a Territory or to the District of Columbia—Continued.

Police Court for the District of Columbia, judges (Pub. 561, 68th Cong., sec. 3 (a)).
Appointed by President with consent of Senate.
Term of office: Six years and until successor takes office.
Removable by President alone.
Restriction on removal: "For cause."

United States Court for China, judge (34 Stat. 816, secs. 6 and 7).
Appointed by President with consent of Senate.
Term of office: Ten years.
Removable by President alone.
Restriction on removal: "For cause."

E. DENIAL TO THE PRESIDENT OF THE POWER TO REMOVE UNTIL SUCCESSOR IS CHOSEN AND QUALIFIED

Governor General of the Philippine Islands (39 Stat. 552).
Appointed by President with consent of Senate.
Term of office: None specified.
Removable by President.
Restriction on removal: "Hold his office at the pleasure of the President and until his successor is chosen and qualified."

Governor of Porto Rico (39 Stat. 955).
Appointed by President with consent of Senate.
Term of office: None specified.
Removable by President.
Restriction on removal: "Hold his office at the pleasure of the President and until his successor is chosen and qualified."

F. REQUIREMENT OF COMMUNICATION BY PRESIDENT TO SENATE OF REASONS FOR REMOVAL

Comptroller of the Currency (sec. 324 R. S.).
Appointed by President with consent of Senate.
Term of office: Five years.
Removable by President.
Restriction on removal: President to communicate reasons for removal to Senate.

Director of the Mint (sec. 343 R. S.).
Appointed by President with consent of Senate.
Term of office: Five years.
Removable by President.
Restriction on removal: President to communicate reasons for removal to Senate.

APPENDIX H

Constitution of the United States

[Amendments shown by matter printed in brackets]

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one. Connecticut five, New York six, New

Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two-thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one-fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have been originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the

Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment), shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another, nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, with-

out the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisals; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or ingage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

SECTION 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Major-

ity of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the list the said House shall in like manner chuse the President. But in Chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.]

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neiher shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removel, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United

States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers

and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress, shall make.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

ARTICLE IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour,

but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned, as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States: and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One Thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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The Senators and Representatives before mentioned and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

APPENDIX I

Amendments to the Constitution

ARTICLE I

Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition of the Government for a redress of grievances.

ARTICLE II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, and when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

ARTICLE VI

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons

voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate:—

The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted:—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male Citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

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